United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

77-7121

United States Court of Appeals

FOR THE SECOND CIRCUIT

DORALEE ESTATES, INC.,
Plaintiff-Appellee,

—against—

CITIES SERVICE OIL COMPANY,
Defendant and Third Party Plaintiff-Appellant,

—against—

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,
Third Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

(Volume II of III—Pages A-447—A-925)

GEORGE H. COLIN, ESQ.
BAER MARKS & UPHAM
70 Pine Street
New York, New York 10005
(212) 344-1700
Attorneys for Defendant and Third Party Plaintiff-Appellant, Cities Service Oil Company

GERALD ORSECK, ESQ.
ORSECK LAW OFFICES
Route Fifty-Two East
Liberty, New York 12754
(914) 292-5800
Attorneys for Plaintiff-Appellee, Doralee Estates, Inc.

JOSEPH D. AHEARN, *Of Counsel*
GRUBBS, LEAHY & DONOVAN
27 Cedar Street
New York, New York 10038
(212) 374-3535
(212) 349-8277
Attorneys for Third-Party Defendants-Appellees, MGO Corp. and Monticello Gas and Oil Co., Inc.

PAGINATION AS IN ORIGINAL COPY

INDEX

	Page
DOCKET ENTRIES	A-1
SUMMONS	A-4
VERIFIED COMPLAINT	A-5
EXHIBIT "A" TO VERIFIED COMPLAINT - STIPULATION OF SETTLEMENT	A-14
THIRD-PARTY SUMMONS	A-18
THIRD-PARTY COMPLAINT	A-19
EXHIBIT A TO THIRD-PARTY COMPLAINT - VERIFIED COMPLAINT (reproduced herein at pages A-5 - A-17)	A-22
VERIFIED ANSWER TO COMPLAINT	A-23
ANSWER TO THIRD-PARTY COMPLAINT	A-27
NOTICE OF MOTION TO INCREASE PUNITIVE DAMAGES	A-29
AFFIDAVIT OF GERALD ORSECK, ESQ., FOR PLAINTIFF, IN SUPPORT OF MOTION TO INCREASE PUNITIVE DAMAGES	A-30
AFFIDAVIT OF ROBERT M. GRUBBS, ESQ., FOR THIRD-PARTY DEFENDANT, IN OPPOSITION TO MOTION TO INCREASE PUNITIVE DAMAGES	A-32
AFFIRMATION OF GEORGE H. COLIN, ESQ., FOR DEFFND-ANT, IN OPPOSITION TO MOTION TO INCREASE PUNITIVE DAMAGES	A-35
REPLY AFFIRMATION OF GERALD ORSECK, ESQ., FOR PLAINTIFF, IN SUPPORT OF MOTION TO INCREASE PUNITIVE DAMAGES	A-39
EXHIBIT I TO ORSECK REPLY AFFIRMATION - ORDER ON CONSENT	A-43
EXHIBIT II TO ORSECK REPLY AFFIRMATION - LEASE	A-47

INDEX

		Page
EXHIBIT III TO ORSECK REPLY AFFIRMATION - INTER-COMPANY LETTER DATED APRIL 8, 1973 FROM L.C. LANGBEIN TO R.G. BECK		A-53
EXHIBIT IV TO ORSECK REPLY AFFIRMATION - INTER-DEPARTMENTAL MEMORANDUM DATED JANUARY 26, 1973 ENTITLED "CONSTRUCTION REQUISITION"		A-54
EXHIBIT V TO ORSECK REPLY AFFIRMATION - AGREEMENTS BETWEEN CITIES SERVICE AND INDEPENDENT CONTRACTORS		A-55
EXHIBIT VI TO ORSECK REPLY AFFIRMATION - INTER-COMPANY MEMORANDUM DATED AUGUST 8, 1973		A-58
MEMORANDUM AND ORDER GRANTING MOTION TO INCREASE PUNITIVE DAMAGES		A-59
THIRD-PARTY DEFENDANTS' REQUESTS TO CHARGE		A-60
PLAINTIFF'S REQUESTS TO CHARGE		A-66
DEFENDANT'S REQUESTS TO CHARGE		A-92
TRANSCRIPT OF JURY VOIR DIRE		A-102
TRANSCRIPT OF TRIAL		A-167
Plaintiff's Witnesses:		
Robert Rosch	Direct	A-194
	Cross	A-206
	Redirect	A-221
	Recross	A-223
Theodore R. Hudson	Direct	A-225
	Cross	A-244
	Redirect	A-283
		A-288
		A-307
	Recross	A-287
		A-292
		A-310

INDEX

		Page
Deposition of Leroy C. Langbein	Direct	A-320
Matthew Peter Motl	Direct	A-344
	Cross	A-355
Deposition of John Kwak	Direct	A-380
Sam Greene	Direct	A-415
	Cross	A-442
Leroy C. Langbein	Direct	A-447
	Cross	A-475
	Redirect	A-490
	Recross	A-492
William Edison	Direct	A-496
	Cross	A-513
	Redirect	A-576
Deposition of Joseph G. Spodaryk	Direct	A-582
Dora Huss	Direct	A-626
		A-1129
	Cross	A-678
		A-1142
	Redirect	A-914
Alvin Adler	Direct	A-1120
	Cross	A-1122
	Redirect	A-1125
		A-1127
	Recross	A-1125
Defendant Cities Service's Witnesses:		
Susan Diane Wissner	Direct	A-922
William J. Rieber	Direct	A-927
	Cross	A-966
	Redirect	A-984
	Recross	A-985

INDEX

		Page
Alvin Adler	Direct	A-989
	Cross	A-1016
	Redirect	A-1060
	Recross	A-1062
Jeffrey L. Liddle	Direct	A-1064
James Sadleck	Direct	A-1146
	Cross	A-1150
Motions		A-747
		A-848
		A-1079
Charge of the Court		A-1250
Court's Exhibits:		
1 - Questions to be Given to Jury After Trial Under F.R.Civ.P. 49(a)		A-1333
2 - Jury Note		A-1336
3 - Verdict Form		A-1337
4 - Jury Note		A-1339
5 - Jury Notes		A-1340
6 - Defendant Cities Service Oil Company's Supplemental Requests to Charge		A-1343
7 - Defendant Cities Service Oil Company's Amended Requests to Charge		A-1346
8 - Defendant and Third-Party Plaintiff's Requested Jury Instruction No. 14		A-1356
NOTICE OF MOTION TO REDUCE AWARD OF PUNITIVE DAMAGES		A-1357
DECISION ON MOTION TO REDUCE AWARD OF PUNITIVE DAMAGES		A-1360
JUDGMENT APPEALED FROM		A-1361

T.9

DORALEE ESTATES, INC.,
vs.
CITIES SERVICE OIL CO., 73 Civ. 907
vs.
MGO CORPORATION

January 5, 1977
10:30 a.m.

(Jury in box.)

THE COURT: You may proceed.

MR. ORSECK: I call Mr. Langbein.

L E R O Y C. L A N G B E I N, called as a witness by the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

xxx

BY MR. ORSECK:

Q Mr. Langbein, would you please give the jury your full name and your home address.

A Leroy C. Langbein. I live in Marshfield, Massachusetts.

Q What is your present occupation?

A My title with Cities Service is construction supervisor.

Q How long have you been so engaged?

A With that title?

Q Yes.

A Since January 1.

Q Of this year?

A T hat's right.

Q How long have you been with Cities Service in a managerial capacity?

MR. COLIN: I object to that.

THE COURT: No foundation for that.

Proceed.

MR. ORSECK: Your Honor, I really don't like to argue with the Court except in the deposition testimony of Mr. Langbein there has been evidence to that effect. However --

THE COURT: Lay a little foundation as to what his duties are and you will have accomplished your purpose.

Q You have been with Cities Service for how long?

A Forty-four years.

Q How many of those years, if any, have been in a managerial capacity?

MR. COLIN: I object to that.

THE COURT: Sustained.

What do you do with Cities Service?

THE WITNESS: I supervise construction of service stations.

THE COURT: How many people do you supervise in the course of that work?

THE WITNESS: None but the contractors.

THE COURT: Do you have some authority?

THE WITNESS: To the extent of the authority granted me by my supervisor.

THE COURT: What is that?

THE WITNESS: To buy materials and issue contracts.

THE COURT: What else do you do?

THE WITNESS: That's about all I do now.

THE COURT: Proceed. You may develop this further, if you wish.

BY MR. ORSECK:

Q During 1972, what did your duties consist of?

A Supervising the construction of new service stations, which was very limited, and maintaining Cities Service owned or controlled properties, specifically, service stations.

Q Did part of your duties entail supervision of maintenance of the plant owned by Cities Service at Cold Spring Road, Monticello, New York?

A No, sir.

Q You heard Mr. Greene testify yesterday, did you not?

A Yes, sir.

Q He testified that he got either prior approvals or reimbursement from Cities Service for various items of maintenance during this time period.

A That's true.

Q Was he correct?

A That's true.

Q To that extent you did supervise maintenance on behalf of Cities Service at the plant, did you not?

MR. COLIN: Objection.

THE COURT: I will overrule it at this point. You may answer.

A I didn't supervise the work.

Q What did you do?

A If Mr. Greene had something he wanted done and he communicated with me, I would pass it on to the wholesale sales department.

Q Of whom?

A Cities Service.

Q So that even if it were not you ultimately, Cities Service did have a modicum of control over aspects of maintenance of Monticello Gas and Oil?

A Only for structural repairs.

MR. COLIN: Objection, your Honor.

THE COURT: I will permit that to stand.

Q Mr. Greene testified yesterday that Cities Service installed the culvert adjacent to the plant owned by Cities Service. Do you recall that testimony?

A Before my time.

MR. COLIN: Objection, your Honor.

THE COURT: The witness has answered. He said it was before his time.

Q You do not doubt or contradict Mr. Greene with respect to that testimony, do you?

MR. COLIN: I object to that.

THE COURT: I will sustain that.

Q Do you have any information of any kind which would indicate that Cities Service did not install that culvert?

MR. COLIN: I object to that.

THE COURT: I will sustain that.

You have the testimony of Mr. Greene yesterday.

Q Did there ever come to your attention the fact that a complaint was made of oil drainage from the Cities Service plant at Cold Spring Road in Monticello, New York into the properties and lakes owned by Doralee Estates?

A Yes.

Q When for the first time did you personally become aware of such complaints?

A (Pause) '72, in the middle of the year.

Q Would it be a little more accurate that it was in the spring of the year, around March, maybe?

MR. COLIN: Objected to.

THE COURT: Overruled.

A I say that because I took over in August of '72 the responsibility of that area.

Q Isn't it a fact that the correspondence which you made available to me at your deposition indicated under your signature and knowledge of this condition around March of 1972?

MR. COLIN: I object to that.

THE COURT: Overruled.

A I don't think so.

Q The Court has received testimony --

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: I don't want to interfere with your examination, but the form in which you were putting this is susceptible to all of these objections which have to be sustained. If you have correspondence, why don't you show it to him and ask him if that's his letter, and Mr. Colin will not object to that.

MR. ORSECK: So that the Court is aware of

the purpose of my questioning, there have been portions of some of these exhibits which the Court has excluded from admission. I don't want to make this trial any longer than it has to be. I intend to direct my questions to him with the purpose solely of obtaining admission into evidence of some of the deleted portions of the exhibits.

THE COURT: Keep in mind that I deleted portions because I thought they were not properly being received as admissions against interest because they contained speculations and contained hearsay statements of other people. To the extent you are going into other matters that are independently admissible through this witness, obviously there can be no objection.

(In open court.)

BY MR. ORSECK:

Q Mr. Langbein, were you in court at Monticello, New York?

A No, sir.

Q Were you aware of that lawsuit at the time?

A At the time, no sir.

Q In April of 1973 did you have communication with Sam Greene of Monticello Gas & Oil concerning the oil spill problem?

A Yes, I did.

Q You are not here because I subpoenaed you; is that correct?

A That's right.

Q Mr. Colin asked you to be here?

A That's right.

Q Have you within the last few days had a chance to review the documents, copies of which you presented me with at the deposition a few years ago?

A Yes.

Q Of course those documents refreshed your recollection?

A Yes.

Q You had a lot of other things to do besides worrying about this problem?

A That's correct.

Q Mr. Greene made you aware during April of '73 that the New York State Department of Environmental Conservation made a complaint with respect to this oil spillage; is that correct?

MR. COLIN: I object to the form of the question.

THE COURT: No. I will permit it.

Go ahead.

A Yes.

Q As a matter of fact, he sent you copies of a citation which New York State served upon Monticello Gas?

A Copies, that's correct.

Q He also told you, did he not, that there was a $500 fine?

A Yes.

Q He also told you that he expected you -- and I don't mean you Mr. Langbein, but you Cities Service -- he expected Cities Service to pay that fine.

MR. COLIN: I object to the form of the question.

THE COURT: Overruled. This is a conversation.

MR. COLIN: I'm objecting to the continuous leading in the form of the question.

THE COURT: Normally that's not so, but this gentleman is employed by an adverse party.

A I think his exact words were he thought Cities Service should pay for it.

Q Being you have reviewed these documents to save some time, instead of me coming up and handing it to you, do you recall that on April 8, 1973, you wrote a memorandum to a Mr. Beck and you signed it and you specifically said, "At any rate, the fine was $500 which he expects us

to pay"?

A Right.

Q Sam Greene also told you, did he not -- again, when I say "you" I mean Cities Service -- that if you had been present at the hearing the fine would have been $2500? Isn't that so?

MR. COLIN: I object to that.

THE COURT: On what ground?

MR. COLIN: On the ground that anything Mr. Greene said would not bind Cities Service, and I think this is a highly prejudicial question because of the speculation that underlies it. Cities Service was not, in fact, a party to that proceeding.

THE COURT: This was reported by Mr. Langbein in an interoffice memorandum.

MR. COLIN: I don't think it is relevant to this case what Mr. Greene speculated might have happened if something had happened that didn't in fact happen.

THE COURT: Let me see the exhibit.

MR. ORSECK: This is part of showing that the --

THE COURT: Let me look at the exhibit.

MR. ORSECK: It is the end of the first paragraph.

(Pause.)

THE COURT: I overrule that objection. I will put my reasons on the record at a later time.

Q If you, Cities Service, had been present at the hearing the fine would have been $2500?

A That is correct.

Q It is also true, is it not, is it not, that in numerous documents you, Cities Service, indicated that you recognized it was your responsibility to ultimately take care of this oil spillage?

MR. COLIN: Objected to.

MR. ORSECK: This calls for an answer which is an admission.

THE COURT: Hold on.

Mr. Orseck, the exhibits speak for themselves and, therefore, those are in evidence, I assume, and this question calls for the second best evidence. If you want, you may inquire as to whose responsibility he understood it to be, and that's another matter. The objection to the question put I will sustain.

Q Exhibit 8 now in evidence was obtained by me from your file?

A It was a letter written by the Regional Sales Manager of Cities Service.

Q Do you recall that letter?

A Yes.

Q That was on Cities Service letterhead, correct?

A Yes.

MR. ORSECK: Your Honor, I believe that in the conduct of the plaintiff's case, since portions of these documents ultimately will be read by the plaintiff for chronology, I will ask for leave to read portions during my interrogation of this witness.

THE COURT: You wish to read part of that now? You may.

MR. COLIN: This is not a letter written by this witness or addressed to him.

THE COURT: I understand that.

(Mr. Orseck read to the jury from Plaintiff's Exhibit 8 in evidence.)

Q Let's get back to the conversations you had with Sam Greene with respect to the hearing before the New York State Environmental Conservation Department.

Sam Greene told you, did he not, that at the hearing he pleaded ignorance?

MR. COLIN: I object to that.

THE COURT: I will sustain the objection.

Q In the memorandum of April 8, 1973, you did

way, did you not --

MR. COLIN: Identify it by exhibit number.

MR. ORSECK: Exhibit 4.

Q -- that we, meaning Cities Service, are liable for all past sins and omissions of MGO and the predecessors.

MR. COLIN: Show him the document if you're asking him if it says that, please.

(Pause.)

Q Right here, the second line (indicating).

A That's my note.

Q So the testimony is that you did say that under your signature; is that so?

A Yes. I said that.

Q That was on April 8, 1973?

A Yes.

MR. COLIN: This is the portion that your Honor excluded previously.

THE COURT: I did. That's correct.

Q In July of 1973 you wrote another memorandum. This is Exhibit 13, which is for identification only at this juncture.

MR. COLIN: I have just observed, your Honor, that Mr. Orseck's question chopped a sentence in half with a resulting change in meaning.

MR. ORSECK: I offer the whole document in evidence.

MR. COLIN: Your question did not offer the whole sentence. What I would like to point out, your Honor, is that this document says in the complete sentence -- it is an "if" sentence.

THE COURT: That's not inconsistent with your offer of the entire exhibit. Is there any reason why he should not read the whole section?

MR. ORSECK: I have no objection.

THE COURT: Proceed.

MR. COLIN: "At any rate I do not think we are getting any bargain in giving this land to MGO if we are liable for all past sins and omissions of MGO and the predecessors."

That's the sentence.

MR. ORSECK: Your Honor, I don't think that is inconsistent.

THE COURT: It alters it a little bit.

Q The fact of the matter is that Cities Service at its expense did dismantle the plant, true?

A Yes.

Q It is a fact that Cities Service at its expense did cause the top soil to be removed during the summer of '72?

A Correct.

Q Cities Service did replace the oil saturated earth with clean topsoil at its expense, did it not?

A Replaced dirt.

Q Let's get back to the document that I just asked you about. Is it true that in either late June or early July of 1973 Sam Greene told you that at places at the plant in order to get down deep enough to get rid of all of the oil-saturated soil the contractor had to dig as far as three feet?

A That's correct.

Q You so indicated it in that memorandum, did you not?

A That's right.

MR. ORSECK: Exhibit 13 previously was rejected. I would now offer it, your Honor.

(Pause.)

THE COURT: Is there any objection?

MR. COLIN: I object to it because I do not think it is at all relevant to the issues here.

THE COURT: Mr. Grubbs, do you have any objection?

MR. GRUBBS: May I see it, please?

(Pause.)

MR. COLIN: It represents events subsequent to the institution of the action and, indeed, subsequent to the vacating of the premises by MGO.

MR. GRUBBS: I object to it as subsequent.

THE COURT: To the extent it shows a depth of digging for certain purposes I believe it to be admissible.

xxx (Plaintiff's Exhibit 13 received in evidence.)

Q There was a document dated January 26, 1973. This is Exhibit 5 for identification. That came from your file, did it not?

A Yes.

Q That document contained at least three signatures that are partly legible and two more that are illegible, all people in Cities Service with some type of authority, isn't that true?

A Yes.

Q Cities Service, whom you represent in this case, acknowledged in that document, did it not, that we are now under court order to either install an oil water separator or cease operations? Isn't that correct?

MR. COLIN: I object to the question.

THE COURT: On what ground?

MR. COLIN: On the ground the document speaks

for itself.

THE COURT: That objection will be sustained. The document is not in evidence.

Offer the document in evidence.

MR. ORSECK: I withdraw the question to the witness. Excuse me.

I offer the document in evidence now.

THE COURT: Is there any objection?

MR. COLIN: There is no identification of this witness with this document, your Honor.

THE COURT: He says this is signed by people at the Cities Service who had authority to write it.

MR. COLIN: I believe that to have been the fact.

THE COURT: The witness said so in earlier testimony.

MR. COLIN: I think, your Honor, to the extent this document purports to characterize the effect --

THE COURT: This is in evidence. I admitted this in evidence with the exception of a part of a sentence. I admitted it yesterday after lunch.

MR. ORSECK: I apologize.

THE COURT: It is in evidence.

There are three others I ruled on. Let's be

sure those are all in.

I reserved on Exhibits 4, 5, and 7 and admitted them with certain excisions.

MR. ORSECK: I apologize, your Honor.

MR. COLIN: May I approach the bench, your Honor?

THE COURT: It is in evidence. Is there any reason he may not read it?

MR. COLIN: I want to direct a further consideration to your Honor with respect to excising part of the document.

THE COURT: All right.

(At the side bar.)

MR. COLIN: I would suggest, your Honor, that the characterization by a lay person of being under a court order to do or not to do something is not as such that it should have a binding effect.

THE COURT: The reason I permitted that, you are correct, is that he is a lay person. But it reflects a state of mind as to the degree of compulsion upon the company. If the company feels there is a court order there is a different state of mind. That language is admissible because it shows what Cities Service thought was the obligation upon it, not whether it was the fact or not. I really

1 am not concerned with that.

2 MR. COLIN: If Cities Service mistakenly be-

3 lieved it is to be obliged to be something that would not

4 be part of --

5 THE COURT: That's a matter of punitive dam-

6 ages, among other things. I gave specific consideration

7 to that.

8 (In open court.)

9 MR. ORSECK: I will read to the jury from

10 Exhibit 6 in evidence.

11 (Mr. Orseck read to the jury from Plaintiff's

12 Exhibit 6 in evidence.)

13 MR. COLIN: Your Honor, this has been admitted,

14 but I think it is of a hearsay character and I would rise

15 to that objection.

16 THE COURT: I don't understand why if it is

17 from your file as a statement of facts it is not admissible.

18 MR. COLIN: It is a statement by the writer

19 of a memorandum that he understands from the file that

20 such and so happened.

21 THE COURT: I understand that.

22 MR. COLIN: He does not purport to have per-

23 sonal direct knowledge.

24 THE COURT: I understand. The objection is

25

overruled.

(Mr. Orseck continued to read to the jury from Plaintiff's Exhibit 6 in evidence.)

BY MR. ORSECK:

Q Isn't it a fact that in April of 1973 Monticello Gas & Oil was a commission agent of Cities Service and not a distributorship on its own?

MR. COLIN: I object to the question, your Honor.

THE COURT: Why?

MR. COLIN: There is no basis for this witness having qualification to answer the question. He testified that his work is in the construction or maintenance field.

THE COURT: Let's get that answer from you if that's the answer.

Is that the only objection?

MR. COLIN: Also, the question was answered by Mr. Greene yesterday. He testified that it was not a commission agent after 1969 or 1970.

THE COURT: You contend that this question may not be asked of this witness?

MR. COLIN: I contend there has not been a foundation laid to show the qualification of the witness to answer it. It calls for a conclusion as well.

THE COURT: Overruled.

Read the question.

(Record read.)

A I cannot answer that because I don't know the answer to that question.

Q The document we just referred to, Plaintiff's Exhibit 6 in evidence, a copy of which was addressed to you, states as follows -- and I will read it to the jury since it is in evidence --

MR. ORSECK: I withdraw it as a question and I will read it to the jury.

(Mr. Orseck read to the jury from Plaintiff's Exhibit 6 in evidence.)

Q Did you have anything to do in the middle of 1973 with negotiations between Cities Service and MGO whereby Cities Service attempted to sell the property to MGO, to sell it back to them?

A None whatsoever.

MR. ORSECK: I will read a little more from that same document, ladies and gentlemen.

(Mr. Orseck continued to read to the jury from Plaintiff's Exhibit 6 in evidence.)

Q Mr. Langbein, again, in May and in June, Mr. Greene, in different conversations with you, asked that

you, Cities Service, pay that $500 fine, did he not?

A Not of me.

Q On May 11, Exhibit 9 in evidence, to refresh your recollection, states: He, Sam, asked for the $500 to pay the fine that was levied against MGO.

That's a memorandum that you signed on May 10, 1973. Would that refresh your recollection?

A It would have to, but he could have asked somebody else.

Q The memorandum only talks as to what you did with Sam Greene, does it not (indicating)?

A Yes, it does.

Q On August 8, do you recall that you wrote a memorandum to a Mr. Reardon telling him that you, on behalf of Cities Service, expended $6500 to attempt to comply with the Court's citation? Is that right?

A Right.

Q Do you remember that in July Mr. Koch sent a memorandum to a Mr. Tebo with a copy to you saying that by copy of this letter he is requesting Roy Langbein to furnish you with the total cost of the cleanup operation which was required to comply with the State of New York Department of Environmental Conservation order. Do you remember that?

A Yes.

MR. COLIN: Which memorandum is that?

MR. ORSECK: July 31, 1973.

MR. COLIN: Is there an exhibit number?

THE COURT: He got an answer from the witness. We're interrupting the flow here unless you have some specific reason.

MR. COLIN: I can't rise to an objection if the document inquired about is not identified. I'm trying to follow the course of the interrogation.

THE COURT: He asked him whether certain statements were made and the answer was, in effect, yes.

Am I correct?

THE WITNESS: Yes.

THE COURT: Let's go forward.

MR. COLIN: May I suggest as to any document in evidence, it is repetitious and wasteful of time to ask the witness whether he is familiar with it if it is already marked in evidence.

THE COURT: He is asking whether this had happened.

Overruled.

Let's go forward.

Q August 15, do you remember another memorandum?

MR. ORSECK: This is No. 16, and I don't know if it is in evidence or not.

MR. COLIN: Yes.

Q Do you recall that this memorandum expressed concern that Monticello Gas & Oil wanted Cities Service to hold them harmless from any liability for this oil soak?

MR. COLIN: Objection.

THE COURT: Unless you are going to go on to something else -- the exhibit is in evidence and you don't have to ask this gentleman. That's Mr. Colin's earlier objection and at this time it is well taken.

MR. ORSECK: I will finish with him in two minutes.

(Mr. Orseck read to the jury from Plaintiff's Exhibit 16 in evidence.)

MR. ORSECK: On August 31, 1973, document 17 in evidence --

THE COURT: Do you have any more questions of this witness? Finish with the questions of this gentleman.

MR. ORSECK: I have no further questions.

Only for continuity, I would request leave, prior to cross-examination, to read portions which were admitted in evidence from this witness' file.

THE COURT: You may do that.

(Mr. Orseck started to read to the jury from Plaintiff's Exhibit 17 in evidence.)

MR. COLIN: I am informed by my associate that Exhibit 17 in evidence was withdrawn. I am not certain of my own knowledge, but my associate's notes say so. I wonder what your Honor's notes indicate.

THE COURT: I remember certain exhibits being withdrawn as we were going through them.

My clerk's notes tell me that it was withdrawn.

MR. COLIN: Our notes indicate --

MR. ORSECK: It was withdrawn.

BY MR. ORSECK:

Q Is it a fact that on August 31, 1973, you wrote a memorandum, an interoffice memorandum, on behalf of Cities Service to various people in which you stated --

THE COURT: Hold on. By getting into that you get into its contents before it has been offered.

MR. ORSECK: I will not offer it. I want to ask if he made this statement in writing in the nature of an admission.

THE COURT: Let me see the exhibit.

(Pause.)

THE COURT: You offer Exhibit 17 in evidence?

MR. ORSECK: Yes.

MR. COLIN: I object to it because it post-dates the date of the suit and it is not relevant to the issues of this case.

THE COURT: The objection is overruled. It may be received.

xxx (Plaintiff's Exhibit 17 received in evidence.)

THE COURT: You may read that.

(Mr. Orseck read to the jury from Plaintiff's Exhibit 17 in evidence.)

Q I am sure you do not remember the date, but will you accept that on April 20th a certified letter was sent to you by MGO with copies of that consent order?

MR. COLIN: I object to that, your Honor.

THE COURT: I take it he wants to ask him something flowing from that point of departure.

Q I show this to you.

A It was received by my coworker.

Q On April 24th, is it true that a Mr. Sweeney, an employee under you, evidently signed a certified mail receipt for the consent order and sent the originals to Mr. Koch and gave you copies?

MR. COLIN: Objection, your Honor.

THE COURT: Overruled.

A I know from the notes that Sweeney sent it to Tulsa. I don't know who signed for it.

THE COURT: Isn't that enough?

MR. ORSECK: I will read this to the jury.

Q You recall that the letter of transmittal which is in evidence, No. 18, was addressed to you -- it said "Dear Roy"?

A Yes.

Q And then the letter went on to say, did it not, in sum or substance: Roy, don't sit on this?

A Yes.

Q You didn't sit on it, did you?

A I was out of town. It was sent to Tulsa by Sweeney.

Q Ultimately you did something about his saying: Roy, don't sit on it?

A I called Tulsa.

Q What did Tulsa do, to your knowledge?

A It shows in the file I was directed to go in and do something.

Q Do what?

A To dismantle the tanks and the buildings.

Q And what else?

A Remove some earth from the top of the ground.

Q For what reason?

A To comply with that order on MGO.

#10 Q What was your understanding that the order requested you to do with respect to the soil, or don't you want to tell us?

MR. COLIN: That is objected to.

THE COURT: Objection overruled.

What did you understand you were required to do?

MR. COLIN: I don't think the witness has indicated that he understood there was any requirement on him or Cities Service.

MR. ORSECK: I have no further questions. The jury can figure out the answer. I have no further questions.

THE COURT: You may begin cross-examination.

(Continued on next page.)

CROSS EXAMINATION

BY MR. COLIN:

Q Mr. Langbein, you were asked about a letter marked as Exhibit 17 in evidence in which you stated on August 31, 1973, "All materials were removed from the premises in order to comply with the state order on MGO Co."

Who or what company is indicated by MGO Co.?

A Monticello Gas & Oil Company.

Q At the time you wrote that letter, sir, tell us whether you had seen a copy of the order that had been made on Monticello Gas & Oil Company.

MR. ORSECK: Your Honor, I don't want to interfere with cross examination but --

THE COURT: Overruled. You will have redirect examination.

MR. ORSECK: But the question is self-evident. He admitted in April --

THE COURT: Counsel, please. He is putting a question he is entitled to put. Let's go forward.

A The answer is yes.

Q You had seen a copy of the order?

MR. ORSECK: I'm sorry I objected.

A You said August. I'm sure I saw it by August.

Q The order that you saw and the order that has been

marked in evidence in this case did not have Cities Service Oil Company as a party, did it?

MR. ORSECK: Objection.

THE COURT: Overruled.

A That's true.

Q There was read while you were testifying a portion of Plaintiff's Exhibit 15, a letter of April 20 from MGO Corp., Monticello Gas & Oil Company, to Cities Service Oil Company to your attention at your office in Braintree, Massachusetts. Since a portion of that letter was read, with your Honor's permission I would like to read another portion of the letter.

MR. ORSECK: You have the wrong exhibit number, sir.

MR. COLIN: It is this document (indicating).

MR. ORSECK: Might the record indicate that Mr. Colin inadvertently referred to 15 when he meant 18.

MR. COLIN: Thank you for the correction.

(Mr. Colin read to the jury from Plaintiff's Exhibit 18 in evidence.)

Q Was it your understanding that the fine liability was that of MGO, sir?

MR. ORSECK: Objection.

THE COURT: I sustain the objection.

Q Mr. Langbein, did Cities Service ever pay or reimburse MGO for that $500 fine?

A To my knowledge, no.

Q You heard Mr. Greene testify yesterday, Mr. Langbein, that Monticello Gas & Oil vacated the bulk plant on February 10, 1973?

A Yes.

Q Did they in fact vacate the plant to your knowledge at or about that time?

MR. ORSECK: I object. This is an attempt to parallel testimony.

THE COURT: Overruled.

A Yes, they did.

Q Did you go to those premises in or about the month of February, 1973?

A I'm sure I did.

Q About what time of the month was it, sir?

A It was a cold day, a nasty day.

Q Did you go into the office?

A Yes, I did.

Q Was the office occupied?

A No, sir.

Q Did you inspect the facilities in general?

A Yes, sir.

Q Were they in use?

A No, sir.

Q Did you go to another location and find the MGO plant in operation?

A Yes, I did.

Q Where was that, sir?

A Alongside of the racetrack, a couple of miles away from this plant.

Q After the occasion when you found that the plant was vacated, did you then take the steps that you have described previously to remove the top surface of the land, replace it with new clean material, and have the tanks and structures on the premises removed?

A I did.

Q At the time you did that, who was in control of the premises?

MR. ORSECK: Objection.

MR. GRUBBS: Objection.

THE COURT: I sustain the objection on the ground it calls for a conclusion.

Q Was anyone from MGO at the premises or conducting operations at the premises during the time you performed these operations of cleaning up the soil and removing the structures?

A The place was abandoned.

Q Mr. Langbein, there has been read to the jury a sentence from a memorandum dated January 26, 1973, which is Exhibit 5 in evidence that says, "In addition we are now under court order to either install an oil water separator or cease operations."

I ask you, sir, whether Cities Service Oil Company at that time was in fact conducting any operations at the Cold Spring bulk plant?

A They were not.

Q Who was conducting operations?

A Monticello Gas & Oil Company.

Q The date of this memorandum is January 26, 1973. Tell me, please, how long thereafter operations did cease at those premises?

A In the first part of February they vacated in toto.

Q It is a matter of several weeks less than a month between this memorandum and the time when the operation ceased; is that correct?

A That's correct.

Q From the time that the operation ceased at those premises in February of 1973 to date, have any operations of any kind been conducted there?

A None whatsoever.

MR. COLIN: I have no further questions.

CROSS EXAMINATION

BY MR. GRUBBS:

Q I believe you mentioned, sir, that sometime during 1973 Cities Service removed the tanks.

A Yes.

Q Isn't it true that at all times these tanks were owned by Cities Service?

A Yes.

Q Wasn't it also true that Monticello Gas & Oil Company could not have removed those tanks owned by Cities Service? They were part of the structural part of the premises, right?

A That's true.

Q As a matter of fact, before anything could be done to the structural part of the premises, they would have to get your permission?

A Cities Service permission, yes.

Q In that connection, when anything had to be done with the building or the pumping equipment or the plumbing, they would contact Cities Service, would they not, Monticello?

MR. COLIN: I object to that.

THE COURT: What is the basis of the objection?

MR. COLIN: It is hypothetical. There is no proof that any such circumstance occurred. Further, it is not relevant to the issues of the case.

THE COURT: Lay a foundation. Objection sustained.

Q Were there times when you were called by Mr. Greene or someone in Monticello to be informed that some part of the premises needed repair? Is that true during 1970 to 1973?

MR. COLIN: The witness testified --

THE COURT: Counsel, let's get an answer from the witness. We do not need an answer from you.

Did that occur at any time between '70 and '73?

A I only got in the picture late in '72. Only insofar as major structural repairs.

Q Tell us what those major structural repairs were.

A A new roof or a new oil burner.

Q Anything else?

A Not during my time, no.

Q Before that new roof and the new oil burner was installed, did you or somebody from Cities Service go to the premises to inspect it to see whether in fact it needed it?

A Yes.

Q It was only after Cities Service or their employees were convinced that that had to be done that it was done?

A Major work, yes, sir.

Q As a matter of fact, wasn't it true that Monticello was not to make any structural repair without Cities Service consent?

A I would say no.

Q You pointed out two things you recall that Cities Service inspected and had done. Were there other things?

A Not to my knowledge.

Q Was there ever any compressor replaced at the plant?

A I do not know.

Q Was there any culvert installed at the plant during the 1970's?

A Persons other than myself.

Q In other words, your personal knowledge is not complete as to whether or not there might have been others?

A Prior to '72, no.

Q Was there any painting done on the premises and charged to Cities Service?

A Not during my tenure.

Q How about the installation of a pressure tank. Was that ever done?

A I think for the water pump, yes.

Q Did Cities Service inspect to see if that was necessary?

A No. I did not inspect to see if it was necessary.

Q Did you pay the bill for having it done?

A Yes.

Q Before you paid the bill did you check to see that it was done?

A No. I took their word for it.

Q Was your position at one time during the 1970's manager of construction and maintenance for the New York Region of Cities Service properties?

A No. Of Cities Service service stations.

Q This plant on Cold Spring Road --

A It was not included.

Q Did you ever go to that plant?

A Yes, but not in an official capacity.

Q How many times did you go to it, sir?

A For what years?

Q During 1970's. From '71 or '72 to '73.

A Maybe four times. Maybe five times.

Q Were there some plumbing repairs made in 1972 at

the Cold Spring Road plant?

A I do not recall.

Q I show you this paper and see if it refreshes your recollection.

A In March of '72 I had nothing to do with the plant.

Q In March of 1972 you had nothing to do with the plant?

A Not until August.

Q Who did have something to do with that plant from Cities Service?

A If I recall correctly, his name was Howard Fields at that particular time.

Q How many times would Mr. Fields go to the Cold Spring Road plant?

A I have no idea.

Q Was it his duty to go and inspect and see that the premises were properly maintained?

A Not specifically. A field engineer would do that.

Q Who was the field engineer that did that for Cities Service?

A I believe his name was Frank Battagliano.

Q What was the practice of Cities Service in having that man with that position inspect? How often would he go to inspect the premises?

A On my request.

Q Anytime anything had to be done would he be called on to inspect?

A Only if the sales department asked him.

Q Would they authorize repairs without having him inspect the location?

MR. COLIN: I object to that.

THE COURT: Overruled.

MR. COLIN: Hypothetical.

THE COURT: Overruled.

A I have no idea.

Q How many years have you been with Cities Service?

A 44.

Q Do you know the practice of Cities Servide before they pay the bill for any repair, do they have a practice to see whether or not the property requires that repair?

A I don't know how to answer that. It was one of the rare properties, it was a tank station. It was very rare. We handled that differently than a service station.

Q Was there ever any structural steelwork done on the warehouse at Cold Spring Road plant of Cities Service?

A Not during my time.

Q Was there a gate and fence installed at the Cold Spring Road plant during your term?

A Yes, there was.

Q When did that take place?

A Not during my term.

Q Was it done to your knowledge?

A It was done to my knowledge.

Q Did Cities Service pay for it?

A Yes, they did.

Q Before they paid for it did Cities Service check to see if it was done?

A I presume so.

Q Did there come a time when the Cities Service either through their own agents pay for a repair to a pipe, a three-inch pipe at the plant owned by Cities Service?

A I have no knowledge of that.

Q Did Cities Service install a catch ditch at the premises during the 1970's?

A I do not know when it was installed.

Q Did Cities Service do it whenever it was done?

A My files say this but I don't know.

Q Your files confirm that; is that correct?

A Yes.

Q Isn't it true that at all times Cities Service was empowered to come to the premises and inspect and determine whether any repairs or maintenance was required on that

plant?

MR. COLIN: I object to that.

THE COURT: On what ground?

MR. COLIN: On the ground that the lease document between the parties is the best evidence of the relationship and the rights and obligations.

THE COURT: Overruled.

MR. COLIN: He said "empowered."

THE COURT: This has to do with whether he knows they were doing this.

Q Answer the question.

A I never made inspections for that purpose.

Q For what purpose --

THE COURT: That is not the question. The question is whether Cities Service owning a tank plant like that would have the right to go in and inspect it to make sure that the premises was kept up in good order.

A They had the right but I didn't exercise it too often.

THE COURT: We have an answer.

Q How often did you exercise it?

A Never.

Q Didn't you ever go to the premises and talk to Mr. Greene about the plant, the conditions of the plant?

A No.

Q Did you ever talk to anybody when you went to the plant?

A Yes, I did.

Q To whom did you speak?

A If Sam was there I would talk with him or one of the girls. I would pass the time of the day. I may have been on my way north to Binghamton. Many of my stops was not made specifically to see anybody. I was passing through.

Q As maintenance engineer for the company didn't you take a look at the premises while you were there?

A No, sir. I can see what I see but this was a sales responsibility basically.

Q I beg your pardon?

A This was a sales responsibility basically.

Q The Cities Service salesmen were supposed to do that --

A No, no. Cities Service sales was the party who communicated with the customer. All communications went through the sales department.

Q To whom would they go in Cities Service?

A The salesmen and then into the office to the superior in charge of that department at the time.

Q There was some talk here as to whether or not

Cities Service sold these premises to Monticello Gas & Oil Company. They did not, did they?

A No. They didn't sell it to Monticello Gas & Oil Company.

MR. GRUBBS: Thank you.

(Continued on next page.)

THE COURT: Is there anything further?

REDIRECT EXAMINATION

xxx BY MR. ORSECK:

Q During my short interrogation, Mr. Langbein, you did say from 1972-1973 you had a lot of other things to do? Isn't that correct?

A Yes.

Q You also said that without having refreshed your recollection by looking at this file the last few days the probability is you could not answer the questions to the extent you did; that's also true?

A Probably so.

Q Tell the jury whether or not it is a fact you don't have one memorandum, anything in writing, which would indicate that February 10th was the date that that plant was closed in 1973?

A That's true.

Q So that's pure memory.

A I said the beginning of February. I didn't give you a date.

Q You also said you remembered it was very very cold?

A Yes.

Q Could it have been in March?

A It could have been.

Q It could have been in April too?

A No. I doubt if it was in April. In April we started something else.

Q Could it have been May 9, 1973?

A No.

Q You're sure of that?

A I am positive. May would not be that cold.

Q You are positive that it would not be that cold in May or you are positive that on May 9, 1973 that was the day the plant was broken down?

MR. COLIN: I object to the question.

THE COURT. Overruled.

MR. COLIN: I think the question has two contradictions within it.

MR. ORSECK: We will show those contradictions.

(Record read.)

THE COURT: Objection overruled.

A I am positive that it was not that cold in May, and I am positive the plant was closed down before May.

Q The other day up at the side bar Mr. Colin said --

THE COURT: Hold on! Don't do that. Put a fact question to this gentleman.

Q How long have you known George Colin, the attorney for Cities Service?

MR. COLIN: I object to that. I do not think it in any way affects this witness' credibility or status as a witness.

THE COURT: Overruled.

A I don't know how long Mr. Colin was associated, but I came to New York in 1941. It could have been from '41.

Q Some thirty-five years?

A If he was in New York in '41.

MR. ORSECK: No further questions.

THE COURT: Anything further?

RECROSS EXAMINATION

xxx BY MR. COLIN:

Q Mr. Langbein, in what way did you come to know me initially?

MR. ORSECK: Your Honor --

THE COURT: Overruled.

A You were Cities Service' legal department.

Q Do you have any acquaintance with me in any other way?

A None whatsoever.

Q Have you ever visited my home or have I ever

visited yours?

A Never.

Q It is only because I was associated with the law function of the company?

A That's true.

THE COURT: Thank you very much. You are excused.

(Witness excused.)

THE COURT: Ladies and gentlemen, we will take our recess.

(Jury excused.)

THE COURT: I want to put on the record some reasons for rulings which may have otherwise been obscured. Allowing the questions about this witness discussing with Mr. Greene the possibility that the fine would have been $2500 had Cities Service been there, it seems to me that the jury should be permitted on this record to consider the question as to whether or not Cities Service was using Monticello as a front for its operation and deliberately stayed away. I think this is some evidence, given all of the evidence we heard yesterday from Mr. Sam Greene as to the degree of participation of Cities Service in the maintenance and upkeep, etc., as to the Monticello plant.

I permitted the testimony as to the professional

pgem

engineer's statements as to oil seepage in the middle sixties, which you asked me to exclude, and I did not because it seemed to me that that was knowledge to Cities Service of this problem a long time earlier. It is evidence that the jury could consider that this problem existed and it should be considered together with all the other proof in the case as to its responsibilities, given all the facts.

Also, I take it appropriate to permit that given testimony I heard attempted to be elicited here as this being oil that seeped down from others further up the road or the road itself.

Finally, Mr. Colin, I don't feel anything flowed from the fact that you were acquainted with this witness, but a great deal was made the other day of Mr. Motl and perhaps somebody else riding down here in a car with certain representatives of the plaintiff. Whether or not the jury chose to accept the suggestion, the suggestion was certainly being elicted that during the course of those rides the case was discussed in a way that might have affected the testimony of the witness. That inference would not be unreasonable. Under the circumstances I feel the questions were permissible as to your acquaintanceship with the witness, not that I think there was any impropriety or anything occurred.

pgem

MR. COLIN: Your Honor, I do not think I asked those questions.

THE COURT: Someone did.

We will take a brief recess.

MR. COLIN: May I note my exception to your Honor's ruling.

THE COURT: On what score?

MR. COLIN: On the statement of Mr. Greene to Mr. Langbein that he believes Cities Service if a party would have been fined.

THE COURT: You don't need to take exception. It was already made. I was just explaining why I made it.

(Recess.)

(Continued on next page.)

(Jury in box.)

12:25 p.m.

W I L L I A M E D I S O N, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ORSECK:

Q Would you give the jury your full name and address.

A William Edison, Gramsville, New York.

Q What is your occupation?

A Licensed real estate broker.

THE COURT: I take it Gramsville is somewhere near Monticello?

THE WITNESS: Yes.

THE COURT: How far away?

THE WITNESS: 17 miles. I live in Gramsville but my office is in Woodburne, New York.

THE COURT: Also in the Monticello area?

THE WITNESS: Yes, sir.

Q What is your business trade name?

A Edison Rakousky Real Estate.

Q Do you have licensed salesmen associated with your office?

A Yes, sir.

Q How many?

A 17.

Q How long have you been in the real estate business?

A 11 years.

Q How long have you been in the real estate business in Sullivan County?

A 11 years.

Q Do you belong to any realtor's organizations?

A Yes, sir. I belong to the Sullivan County Board of Realtors, the State Board of Realtors, the National Board of Realtors, appraisal societies, and other organizations.

Q Have you ever testified in any court or any other forum with respect to your expertise in real estate?

A Yes, sir.

Q Would you tell the Court and jury when and where and on what occasions?

A I do appraisals probably fifty a year for the Surrogate's office of Sullivan County.

THE COURT: That is the Surrogate Court. You are appointed by the Surrogate to do real estate appraisals?

THE WITNESS: Yes.

THE COURT: This is in connection with estates

where they have to establish the value of property that is passing from somebody who has died to somebody else?

THE WITNESS: Yes, sir.

A (Continuing) I have also testified in foreclosure proceedings, petition proceedings and other like proceedings.

Q Have you ever been an arbitrator?

A No.

Q Have you ever testified for me before?

A No, sir.

Q The summer of '76, did I contact you to do some real estate appraisal work with respect to this litigation?

A Early summer.

Q As a result of that retention or employment, did you do certain investigation and fieldwork?

A I did.

Q Would you tell us at some length and detail what preliminary work you did before you came to the conclusions which were required?

A Well, I asked you to set up a meeting with the owner of the bungalow colony, Mrs. Huss, and spent about an hour with her going over the rent rolls and who owned the corporation, how many units there were and asked if I could come on the property.

Q Did you go upon the property?

A I did.

Q Have you been on the property this past fall of 1976?

A Yes.

Q Was the premises just about the same as it was the summer before when you went there for the first time?

A Yes.

Q Before we start asking you about professional opinions, conclusions, etc., the jury up to this point has not had a description of the Doralee property. Keeping that in mind, I would ask if you would describe what the premises look like. Will you do that, please.

THE WITNESS: May I refer to my notes, your Honor?

THE COURT: Yes.

A There is 26 acres that the bungalows are located on.

The property is about 600 feet out of the village of Monticello itself.

On the 26 acres there happens to be 26 units besides three mobile homes which is also used for bungalow purposes.

Q When you say units, you mean bungalows?

A No.

Q You mean rental units?

A Yes. There are three-bedroom units and the balance are one-bedroom units which are rented out for a summer season which consists basically of ten weeks.

Q Continue and describe a typical unit, if you would.

A A typical unit is of course, like I said, there are 23 one-bedroom units with a kitchen, small living room. The kitchen has all the facilities of any normal bungalow colony. The only difference is that the others have two bedrooms, plus they have the normal facilities, swimming pool recreational facilities and they have two lakes on the property.

There is also a sewerage line going through the property 1700 feet going along the road that the village of Monticello -- I don't know if they condemned that 1700 feet, but they were paid for that.

480 feet adjoining an apartment complex, one of the nicest in Monticello, Colonial Hills.

Q Tell us what the Colonial Hills apartments are like.

A They are a couple of years old. Very modern. Of better structure and probably demanding higher rentals.

Q Continue.

A There are two lakes on the property. The big lake is supplied by underground streams and runoff.

Q Did you determine where the runoff was from?

A Actually the property -- that's in a large watershed. The property has a slope to the north and then it levels off into the lakes and then below that another slight slope to Waverly Avenue.

Q There is a large lake three acres adjacent to a swamp, correct?

A Yes.

Q Would you tell the jury whether or not it is a fact that the bungalows are all lower than that lake?

A Yes.

Q Continue.

A The property is not in the Village of Monticello so, therefore, they have their own wells.

I found something that's unreal, that's the only property up there where taxes have actually gone down in value. For instance, when they purchased the property in 1965, June of that year they took title, the property paid taxes to the tune of $3300. The taxes now are $1900.

Q Could you attribute that to anything?

MR. GRUBBS: Objection.

A I really did not.

THE COURT: There is your answer.

A I didn't go into that part of it. I was hired to do one job and only interested in doing that job.

Q Is it true that with respect to each and every one of the bungalow colonies that you investigated in connection with making comparisons that during this time interval the taxes went up?

MR. COLIN: Objection, your Honor.

MR. GRUBBS: Objection.

THE COURT: Yes. I think this is a matter of discretion. I will sustain that.

Proceed.

Q Tell the jury a little more about the facilities, what the extent of the maintenance is.

A The general maintenance was good. It was painted every couple of years as most colonies do. They had a large pool in nice condition.

Generally it was in fair condition.

Q Did you examine the leases?

A No, I did not.

Q Did you determine from information given to you by either Mrs. Huss or myself what the current rents were this past season?

A Yes. During the conversation with Mrs. Huss I

was only out there two times in her presence and on the first occasion I asked to see the rent rolls that she was renting for that particular season.

MR. COLIN: What season is that?

THE WITNESS: '76.

Q Tell the Court and jury what the average rent was per unit.

MR. COLIN: I object to that.

THE COURT: Isn't that something I thought had been unquestionably admissible at some point?

MR. ORSECK: Every one of the leases has been furnished to counsel.

THE COURT: Come to the side bar.

(At the side bar.)

(Continued on next page.)

pgem

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: I assume that in three minutes with competent questioning Mrs. Huss could put all of this in. You're all aware of this. You have taken a deposition and all the rest of it.

MR. ORSECK: He examined her four volumes on the rents.

MR. COLIN: This man is going to render expert testimony.

THE COURT: All we are dealing with is whether there is a proper foundation for this question, and I am asking you whether you have any question.

MR. COLIN: He said he has not looked at the leases and was furnished the figures by Mrs. Huss.

MR. ORSECK: That's always the case.

MR. COLIN: I don't think that's a proper basis.

THE COURT: I agree with you. I told you that when you walked up here. You are not listening to me. All I am asking you is whether or not since this is something that could be established by putting Mrs. Huss on the stand for two minutes, and is something you apparently have taken depositions about at great length, whether you are going to be formal about this matter or informal, or whether we will

take this testimony subject to connection.

MR. COLIN: This man says he has not seen the leases.

THE COURT: I agree.

MR. COLIN: How can he by any process testify --

THE COURT: Because they can put the hearsay into competent form in thirty seconds and you know it.

MR. COLIN: I don't know it.

THE COURT: I will take this testimony.

Do you represent to me that Mrs. Huss is prepared to put these income figures in evidence? Are you going to put them in with her?

MR. ORSECK: Yes, sir. I want to get him out of here for lunchtime.

THE COURT: I will take this testimony subject to connection.

MR. COLIN: Are we going to have a schedule or tabulation?

THE COURT: You must be a little more understanding of the trial process. I, frankly, expect more of you in this regard. You have taken her deposition. You know what these figures are. You know they can be put in. All you are doing is saying that there is no foundation for him.

MR. COLIN: I want to know the predicate of this

pqem

man's opinion.

THE COURT: You may ask him that. If you are not going to fuss about figures, let's not.

MR. COLIN: I will not fuss.

(Continued on next page.)

(In open court.)

THE COURT: You may proceed. We will take this subject to connection.

Q My question was --

THE COURT: What were the rent rolls?

THE WITNESS: The only one I have from Doralee Estates were the year '76 which was getting ready to commence and all rented out. I saw that. The two-bedroom units, of which there were three, were $920 or $925 for the season and the remaining 23 was $725.

THE COURT: This is for the ten-week season?

THE WITNESS: Yes, sir.

MR. COLIN: Your Honor, this is offered as information furnished to the witness, as I understand it, rather than testimony as to the fact itself.

THE COURT: This is what was being charged for these units in the 1976 summer ten-week season, as I understand it.

Is that right?

MR. ORSECK: Yes.

At this time I offer in evidence some 300 or 400 leases.

THE COURT: No. We are just establishing what this is. This is the figure, I take it, at which the units

1 were offered to people to rent and the figure they in fact
2 rented them at.
3 MR. ORSECK: True.
4 MR. COLIN: My objection is that the year 1976
5 is not relevant in the proof of damages in this case.
6 THE COURT: That remains to be seen. That
7 objection is overruled.
8 Proceed.
9 Q I understand you only saw the leases for that
10 one year?
11 A That's correct.
12 Q Did management, did Mrs. Huss, furnish you not
13 with leases but with just figures concerning the rent rolls
14 for the years '67 through '75?
15 A Yes.
16 Q Did you record those figures in your notes?
17 A I did.
18 Q Did you at my request survey bungalow colonies
19 in the Sullivan County area which in your opinion were
20 comparable to the complex or units at Doralee Estates?
21 A Yes, sir.
22 Q As a result of the information furnished to you
23 by Dora Huss and as a result of your surv ey of other
24 comparable bungalow colonies, did you arrive at a conclusion
25

as to whether or not the Doralee rents were comparable, less, or more than the rents at comparable bungalow colonies in the area?

A I did.

Q And what is your conclusion?

MR. COLIN: Objection, your Honor.

THE COURT: On what ground?

MR. COLIN: On the ground that there is no proof in this record of the rents obtaining at any other facility. There is no proof of comparability of facilities, and there is no basis or foundation for a response to this question.

MR. GRUBBS: If your Honor please, I would like to join in that objection. There is absolutely no foundation, proper foundation laid for this kind of conclusion in this type of case.

THE COURT: It does seem to me that this man has been in the real estate there for 11 years. He supervises 17 salesmen. He has for sometime. He has participated some 50 times a year in Surrogate Court appraisal matters in the county. In addition to that he participates in foreclosure proceedings in the county. He is competent to testify as to real estate matters in the county. I overrule the objections.

You may cross examine fully in any manner you

feel is appropriate.

(Record read.)

A Much less.

Q Let's take it year by year from 1967 through '76. Would you answer --

MR. GRUBBS: Objection. I will object to anything prior to October 24 of 1972.

MR. COLIN: I join in that.

THE COURT: Anything prior to April 25, I think, 1972, which included the summer season of '72. I will sustain the objection, Mr. Grubbs, to that extent.

MR. COLIN: I will extend that objection, sir, to anything post-dating February, 1973.

THE COURT: That objection is overruled.

Q The question is corrected, 1972 through 1976. Would you please give an answer in this form if you would, sir. In 1972 --

A I will have to go backward because that's the way --

Q However you do that. Year by year give us the average rent at Doralee and the average rent in a comparable bungalow colony.

A '76 Doralee was getting for a one-bedroom unit 725 -- I would like to explain that 725. There were several

bungalows that were 710, and one I think was 730, so I averaged out at 725. I am trying to be specific as to the amount.

The other units that were of comparable value at other bungalow colonies for one-bedroom units were $1100 in '76. Doralee got for a two-bedroom unit in '76, $920 which they had three of.

Others of equal value, all things being equal, were 1300.

Basically each year, unless there was something that made them of much larger value such as large tennis courts, I didn't use those, but each colony would add on each year and newer units and, therefore, that would not remain the same each year. Doralee did not do that. Evidently they didn't have the funds to do. Each year she raised it $50 per one bedroom, per two-bedroom units. The other units were raising much more, 150, $175.

Q To save you time, is it your testimony that by subtraction, $50 a unit at Doralee each year down to '72 and at the other bungalow colonies --

A Approximately 175.

Q We can -- the jury and Court can do their own arithmetic.

A Mathematics, yes.

MR. ORSECK: I have no further questions.

THE COURT: This is as to both the one and two-bedroom units?

THE WITNESS: Yes, sir.

THE COURT: Mr. Colin?

MR. COLIN: Your Honor, may I suggest, in view of the proximity to lunch hour being 12:45 and the nature of this testimony which requires a little thought preparation, it might be opportune to recess for lunch.

THE COURT: How long do you think you will be?

MR. COLIN: I would like to have a little longer lunch hour so I could have sometime.

THE COURT: When you question how long do you think you will be?

MR. COLIN: It is hard to say, sir. I intend to examine as fully as I am able but I don't think I can forecast the time of my cross examination.

THE COURT: We will recess until a quarter to 2.

(Luncheon recess.)

AFTERNOON SESSION

1:50 p.m.

W I L L I A M E D I S O N , resumed.

CROSS EXAMINATION

BY MR. COLIN:

Q Mr. Edison, how far is Grahamsville, where you live, from Monticello?

A Seventeen miles.

Q How far is Woodbourne, where your office is, from Monticello?

A Nine miles.

Q Who engaged you to do whatever you did in respect of this property, the Doralee Estates?

A Mr. Orseck.

Q What if any instruction did he give you as to what you were to do?

A He asked me to find comparable units as of Doralee and to get comparable rents.

Q Did he ask you to draw any conclusions after doing what you just related?

A Not at that time.

Q Did he ask you at any other time to do anything other or further from what you just told us?

A No, sir.

Q So that was your engagement, to find comparable units and ascertain their rents in relation to the rents at the Doralee Estates?

A Yes, sir.

Q For what period were you asked to do this?

A From '66 or '67, I think.

Q 1966 or 1967 to when?

A To the present time.

Q Were you given any territorial limits?

A Just in the resort area.

Q What did you understand that to mean?

A In the normal area I would cover in my normal business activities.

Q Tell me what that is.

A We normally cover a 50-mile area.

Q From where?

A Woodbourne. That is not to say we don't go farther.

Q Was your search and investigation as widespread as 50 miles from Woodbourne, New York?

A On this particular case?

Q Yes.

A No, sir.

Q What I am trying to find out, Mr. Edison, is the

area of your investigation in connection with your testimony in this case. Tell me what it was.

A There was no unit that I looked at, whether I used -- some I did not use because they were not comparable. But I must have looked at fifteen.

Q Where was that?

A Within ten miles.

Q From where?

A Monticello. Within a ten-mile radius.

Q Do you have notes on the units you looked at?

A Of course.

Q Do you have them with you?

A I have some with me.

May I explain that?

Q If you choose, yes.

A As I go into a bungalow colony, many colonies have different types of units and obviously, each unit being a different type, it is different rentals, so when speaking to the owner I would determine what he was getting for a comparable unit

Q My question to you now, Mr. Edison, is what notes do you have in relation to the units --

A Which colonies?

Q Yes.

MR. ORSECK: We would consent they be received in evidence.

THE COURT: No, counsel. You would not be able to read them anyway.

All you are asked to do is produce your notes. You have now produced them.

Next question.

Q Is it one or more pages that lists the colonies you looked at?

A That I actually used or looked at?

Q First take the ones you looked at and then we will get to the ones you used.

A Four pages. There is only one page which I actually used, that I have with me.

Q Let's take the page you actually used. Are you able to tell me without looking at that page which bungalow colonies you used as comparable units?

A Yes.

Q Tell me, please, and give me the location in each instance.

A Woodlawn Colony, Route 52, Woodbourne, New York. This is the farthest one away from the subject we were using.

Q How far away was it?

A Ten miles.

Q From Doralee?

A Yes.

Q Give me the next one.

A Anawana Colony, Monticello, New York. There are two Anawana colonies in that area. One is the beach colony and the other is just the colony.

Q Yours is the second of the two you mentioned?

A Mine is the first.

Q Yours is the beach colony?

A Mine is Anawana Colony by itself.

Q Give me the next one.

A Lansman's Bungalow Colony.

Q Where is that?

A Between Woodbourne and Loch Sheldrake, New York, Sullivan County, approximately eight miles.

Q From Doralee?

A Yes, sir.

Q And the next, sir?

A Castle View Colony, Monticello, New York, approximately two miles, two and a half miles.

Q All right.

A I'm sorry. I will have to go to my notes now.

Q Go to your notes if you need to, sure.

A East Pond Cottages located in Fallsburg.

Q How far is that?

A Five miles, roughly. Those are the ones that I actually used to determine equal value.

Q Do you know when the Woodlawn Colony was first established? What year?

A No, I do not.

Q How large is Woodlawn Colony?

A Woodlawn? 56 units.

Q Does it have a children's camp affiliated with it?

A No.

Q A day camp for children?

A No, sir.

Q When was Anawana Colony established?

A I really don't know.

Q How large is that, sir?

A May I go back to my notes?

Q Sure.

A (Pause) I'm sorry but I don't have the specific numbers. I think it is 32. I could be off three or four cottages.

Q Lansman's Bungalow Colony.

A That's about thirty years old. They have between 30 and 35 units.

Q And the Castle View Colony?

A 25 units located in Monticello, approximately 25, 30 years old, which was recently sold.

Q Do you know how much it was sold for?

A I know what we had it listed for.

Q That was the price asked by the owner?

A Yes, sir.

Q And East Pond Cottages?

A 29 units, and they are maybe 35 years old.

Q What are the --

A I would like to correct myself. It is 31 units.

Q On East Pond?

A Yes, sir.

Q Did you go into the premises of each of these other comparable units --

A The ones I actually used? Yes.

Q How many units, if any, did you inspect?

A Each place, a varying amount. At no place did I go in all of them.

Q How many did you go into as a generality? Two or three units?

A Once I found a unit that was comparable looking in each of these colonies I would go into it to see if the inside was of the same appearance as the outside. Sometimes that can be deceiving.

Q How many did you go into?

A It would vary from three to half a dozen.

Q When did you make these inspections?

A Just prior to the '76 season.

Q That would be what month, sir?

A The early part of June.

Q Early June of '76?

A Yes.

Q Doesn't the season start at Decoration Day generally?

A Sometimes, yes. It actually starts in reality July 4. That's really the start of the season.

Q How if at all did you endeavor to inform yourself as to the rents that were being paid at these other units?

A I would ask the owner.

Q Did you know each of the owners?

A In some cases, yes, and in some cases, no. For instance, Lansman's I know personally.

Woodlawn, which is owned by Damasack I know personally.

Most of these places we have listed for sale. Most of them but not all of them.

Q Of these five, how many are listed for sale?

A The Castle View was just sold.

Three that I have listed. I don't know whether they are listed with anyone else.

Q Three others apart from the Castle View are listed for sale with you?

A Being the Castle View was just sold, yes.

MR. ORSECK: The answer is two, then?

Q Three are now listed?

A Using Castle View --

Q As one of the three?

A Yes.

Q Did the owners give you a lease to show you what the rents were in any case?

A No, sir. I didn't ask for anyone.

Q You didn't receive one?

A No, sir.

Q Did the owners give you a written schedule of rents applicable to the several units in any case?

A I didn't ask for any.

Q And you didn't receive any?

A No, sir.

Q Did you write down what you say was told to you by the owners?

A Yes, of course.

Q Is that in your notes?

A A summary of it is but not my total notes from each place. When I do an appraisal I visit some places and make a note of each place and then I take notes from my notes and type up an ordinary appraisal.

Q You have here notes that show what each of the owners of these five colonies is said to have told you was the rent structure?

A Yes, sir.

Q May I see those notes?

A Yes. These are just notes that I made from notes from the original ones that I took.

MR. ORSECK: I ask they be marked for identification.

A I'll have to explain some of the stuff on here.

Q Show me the sheets that you say are your notes without any explanation.

A This.

xxx (Defendant's Exhibit C marked for identification.)

Q Does this sheet marked as Defendant's Exhibit C for identification have notes of each of the five comparable colonies and the rents that you were told prevailed by the owners of each?

A Yes.

Q I ask you, sir, to indicate where on that document there appears the name East Pond Cottages and a rental figure related thereto.

MR. ORSECK: Objection.

THE COURT: Overruled.

A East Pond Cottages is about three-quarters of the way down. At the top you will find the average 1976, 1975, one-bedroom, two-bedroom price.

Q Mr. Edison, I see on that exhibit the words, "East Pond," but I see nothing other than 31 units against that name. Is it correct that that is what appears on your notes against that name, 31 units?

A Yes, sir.

Q There is no notation of a rental figure against that name, is there?

A The rental figures are at the top of the page.

Q There is no notation of a rental figure against East Pond?

MR. ORSECK: That is argumentative.

THE COURT: Sustained.

Q Does Woodlawn Colony appear on that note sheet by name?

A On that particular note sheet, no, it does not. That I have on two other sheets.

Q Except for what was told you by the persons you spoke to at these places, you have no knowledge or awareness of the rents paid for units in those facilities; is that correct?

A That's correct.

Q Did you physically examine the Doralee property?

A Yes, sir.

Q Did you walk around the property?

A Yes, sir.

Q Did you observe that the property is about the lowest point in the surrounding area?

A The physical property? You are referring to the land itself?

Q Yes.

A No, sir, it is not.

MR. ORSECK: Your Honor, might the record indicate that direct examination of this witness was as to records. On cross examination if new matter is introduced -- I don't object to the questions but I ask the Court to rule that on new matter the proponent of the question is bound --

THE COURT: I do not regard this as new matter in the sense you are referring to it.

MR. ORSECK: May I renew the motion at such time as I feel it is appropriate?

THE COURT: When you feel it is appropriate, yes.

Q Mr. Edison, did you come to learn that the swamp adjacent to and at the border to the Doralee property had an elevation of 1489?

A Did I come to know that? No, sir.

Q I show you this exhibit that is marked as Plaintiff's Exhibit 1 in evidence. I show you the topographical elevation marking. Do you see that?

A Yes.

Q I show you the lake on Doralee, 1488-1/2 feet. Do you see that?

A Yes.

Q That is lower than the swamp?

A Yes, sir, but Waverly Avenue is also lower.

Q I didn't ask you anything more than that.

A I'm sorry.

MR. ORSECK: The question was: Isn't it the lowest in the area --

THE COURT: Ask that on redirect.

Q Doesn't the nature of the property as a totality have a relationship to its value both for rental and for any other purpose?

A The nature of the property?

Q Yes.

A It sure does.

Q Do you agree that a property that lies in a low area, partly swampy, would have less rental desirability than a property that was not so located?

MR. ORSECK: I object to certain hypotheses within that question.

THE COURT: We are discussing basic principles of real estate evaluation. That is all we are discussing.

If you want to bring this matter up on redirect, make a note of it.

That objection is overruled. We are discussing principles of real estate evaluation at this point?

MR. COLIN: I am dealing with a broad principle, yes.

THE COURT: You may answer the question.

(Question read.)

A I think I would be influenced by it.

Q It would have less value?

A Yes. Anything you do to a piece of property affects value on the negative and plus side.

Q Did you see the swamp adjacent to the Doralee property?

A No, sir, I did not.

Q I show you the topographical map I showed you

before. I direct your attention to the swamp indication thereon and to the boundary lines of the Doralee property and ask you whether the swamp is not adjacent to the Doralee property?

A Yes, sir, it is. I did not see it.

Q You did not see that swamp in the inspection?

A That was not the purpose of my inspection.

Q Is your answer that you did not see it?

MR. ORSECK: Argumentative.

THE COURT: That is what he said two times.

Q You did not take it into account in your judgment; is that correct?

MR. ORSECK: Your Honor, I think the question in form does not relate --

THE COURT: There is no foundation for that question.

Q Mr. Edison, did you prepare anything in writing to represent a summary of what you say and believe in respect to what you were engaged to do in this case?

A I was not asked to other than what I have here.

Q Your answer is that you didn't?

A Anything? Yes. What I have here.

Q Do you have a tabulation that summarizes your conclusions?

A For the Court, you mean? No, sir, I do not.

Q Does the Woodlawn Colony lie near swampy land?

A Near it? I don't know.

Q On its boundary?

A I don't know.

Q What is your answer to the Anawana Colony?

A Yes. There is some swamp there.

Q How close?

A Some of the shoreline is swamp.

Q Of the developed area of Anawana?

A Yes, sir.

Q How about Lansman's Bungalow?

A No.

Q Castle View?

A No.

Q East Pond?

A Yes.

Q How close is the swamp there?

A It is not really a swamp. There are some dead trees that indicates that the underlying surface is wet four or five hundred feet.

Q But it is not a swamp?

A There are dead trees there. It depends on your interpretation.

THE COURT: Is there a marsh?

THE WITNESS: Sort of, but not outlying water.

Q There is no free water; is that right?

A No, sir.

Q Is there any free water at the other one where you said there was --

A Anawana? Yes.

Q Mr. Edison, are you a member of the American Institute of Real Estate Appraisers?

A I'm an associate member, the Mid-Hudson Valley Chapter.

Q Were you informed or did you know of your own knowledge that one of the lakes on the Doralee property is dry every summer?

MR. ORSECK: Objection. That is not in evidence and, besides, it is not a fact and it is improper cross examination.

THE COURT: I sustain that objection. The jury will disregard any facts implicit in the question. It is only answers to the questions that are evidence.

Q Mr. Edison, in your experience how does the owner of a bungalow colony establish the rents that will be charged for the units at the colony?

A By the condition of the building; by the improve-

ments on the property; by the facilities that he has; by the income that he receives each year to improve his property.

Q Does it depend in part upon the age of the property?

A No, sir. It could but not necessarily.

Q Isn't it a general fact that newer facilities command higher rents than older facilities?

A Normally that's true.

Q Does it depend on the location of the facility?

A Geographical location? No, sir. Not in a bungalow colony.

Q Aren't there certain locations that are more desirable than others?

A I would not think so. We have them spread out over 25 miles. We have in excess of 200. They are in every part of the county. There are fifteen townships and every township has them.

With the exception of Nevesink, that is.

Q Would the rental be related to whether there are sports facilities present or not present at the premises?

A Absolutely.

Q That is important?

A Certainly.

Q Tennis courts would be important?

A Absolutely.

Q Promixity to golf courses or the presence of golf courses on the premises would be important?

A Golf courses on the premises?

Q On these premises I am assuming there would not be any golf courses.

A Your assumption is correct.

Q So my question is proximite to a golf course would be a factor, would it not?

A Yes. I suppose so.

Q Did any of these five bungalow colonies --

THE COURT: Ithought it was six.

MR. COLIN: I think he said six in his previous other statement.

Q Did any of these five colonies have tennis courts on the premises?

A No, sir.

Q Did any of them have any sports facilities on the premises?

A Swimming pool, minor facilities.

Q Would the offering of entertainment and shows be an element in the charges made?

A I didn't use any of those for comparables.

Q As a matter of your expert judgment: Assuming --

that a colony offered entertainment and shows of a superior nature and another colony did not, would that make a difference between the amounts --

A A bungalow colony offering shows?

THE COURT: I sustain the objection. That is not a factor here evidently.

Q Did any of these colonies offer --

THE COURT: He said he did not go to any that did.

MR. COLIN: I don't think he said that.

THE COURT: He said that about a minute ago.

Q Did you go through all the units at the Doralee colony?

A Every unit? No, I don't think I did. I went through a vast amount of them but not every one of them.

Q Did you do anything to ascertain the age of the Doralee colony?

A No, sir.

Q Did you observe the age and modernity of the plumbing facilities?

A The age of it? I didn't go into the bathroom and figure out how old it was if that's what you are referring to. No, sir, I didn't. Only as to condition of it.

Q You did not make that --

A I looked at it to determine condition but not to determine age.

Q Did you find them to be rather old fashioned installations?

A They were not new.

Q At the bungalow colonies, the others you went to, did you observe there were more modern plumbing installations?

A That I went to? Of the ones I used?

Q Yes, sir.

A No, sir. They were basically equal.

Q Did you ask the owners to give you the rent income figures for a season other than 1976 at the other bungalows?

A To tell me what they were?

Q Yes.

A He said that normally there are increases and this was an average, it was 175 a year.

Q Who said that?

A The owners.

Q Each owner said the same thing to you?

A He said the average. That's what he said a minute ago.

Q Who was the "he" in your answer?

A In which case?

Q Did you ask the owner of Woodlawn Colony what rents were charged for any years prior to the 1976 year?

A Yes.

Q Did he give you the rents?

A He told me what they were.

Q What did he tell you?

A I think in my Exhibit C, for a one-bedroom it was 1100 and for a two-bedroom it was 1300 and that he received approximately $175 each year more. I think I was instructed only to go back to '72, which was an average.

Q Did you ask him for specific rents for 1975?

A Yes, I did.

Q His answer was $175 less per unit than '76?

A Yes, sir.

Q Did you ask him for a specific rent for '74?

A I asked him for ten years.

Q What was his answer for '74?

A He told me that when I asked for a ten-year period he said he normally got $175 more per year average.

Q If you multiply 175 by ten, what figure do you get, sir?

A 1750.

Q That is a larger figure than the total rent in 1976; isn't it?

A You said since '72. Since oil prices have been going up they have been getting larger increases.

Q You are telling me that the owner of Woodlawn informed you that he got 175 more each year for the past ten years?

A I didn't say that.

Q What did you say?

A You asked a question of 1975.

Q Your answer is --

A That he got an average of $175 more.

Q In '76 then he did in '75?

A That's correct.

Q Did you ask about '74, this same man?

A That was the same answer.

Q He gave you the same answer?

A Right.

Q Did you ask him about '73?

A I asked him for the last ten years and he said he didn't know what it was ten years ago and I asked him what it was in '75, '74, '73, and his answer to me was that he normally gets $175 increase. So the oil price went up in '73, the embargo, that has to go back three or four years.

Q That was the end of your talk with him?

A Yes.

Q You spoke to the Anawana Colony man. Did you ask him what was the rent charged in '75?

A Yes.

Q What did he say?

A Basically the same thing. They averaged out the same. Of all the places I used, each place that I used was basically the same. It didn't vary that much.

Q Each one of these five owners told you, and this is your testimony, I want to have it clear, that the rent in the preceding year averaged $175 less than in '76?

A That's correct.

Q And told you that the rent in '74 averaged $175 less than '75?

A That's correct.

Q And the rent in '73 averaged $175 less than '74?

A That's correct.

Q And does that represent the total recollection you have of what these people told you about the rents?

A Basically, yes.

Q Did they all tell you they had the same rents in '76 for one-bedroom and two-bedroom facilities?

A No.

Q They had varying rents?

A Yes. So did Doralee.

Q Do you have a notation of what --

A I used an average. A certain one-bedroom may rent for 1100. Another one may rent for 1120 or 1130.

Q You took an average figure from these?

A When they were that close.

THE COURT: One may ask for more because it is closer to the lake?

THE WITNESS: It may have a porch on the side. It may have a daybed on the porch. Minor details may mean 20 or 30 dollars more.

Q Do you believe that the owners of these five bungalow colonies were seeking to obtain the best rental income they could for their property?

MR. ORSECK: I object on the grounds it is patently ridiculous, that question.

THE COURT: I will overrule the objection. I cannot answer for management.

Q When real property is owned for income, hasn't it been your experience that the owner seeks to get the best return available from the property?

A Well, there are certain owners that milk the property. There are certain owners whose property is influenced by other values. If you put a pigsty on an adjacent property, that influences the value on those rental units.

What every man does to property it influences the value one way or the other.

Q My question: Hasn't it been your experience that anyone who invests in a piece of income real estate tries to get the best return he can from that investment?

A Yes.

Q No question of that?

A No question of that.

Q Do you believe that these five owners of these comparable properties were trying to do so?

A Of course.

Q Do you believe that the Doralee Estates was trying to get the best return possible from their investment?

A I would certainly assume so.

Q Have you found, Mr. Edison, that rents tend to find their own level in the real estate market?

A It is influenced by some things. There are so many variables which value demands.

Q Because of these variables the rent finds its own level in the marketplace, doesn't it?

A Yes, it does.

Q You cannot charge $2000 a month for a property which in a competitive market will only interest tenants at 1000 a month; isn't that so?

A There is always exceptions but basically that's true.

Q Do you know what was paid by Doralee Estates for the Doralee property?

A May I refer to my notes, sir?

Q If that will help you, yes.

(Pause)

MR. ORSECK: I do not see the relevance, your Honor. I would object on the ground it cannot help the issues one way or the other.

THE COURT: Come to the side bar.

(At the side bar.)

(Continued on next page.)

pgem

THE COURT: How is that relevant?

MR. COLIN: Because I am going to try to get around to the value of her return on investment.

THE COURT: Suppose she inherited it or somebody had to leave and sold it to her in distress? We are not dealing here with return on investment.

MR. COLIN: It is in the record what she paid for this. Mr. Orseck put that in.

THE COURT: We are not dealing with whether she is getting a fair return; we are dealing on whether there has been injury to this property by reason of oil.

MR. COLIN: I don't see how this witness's testimony establishes injury or not. We are talking about damages. I am trying to deal with whether there has been damage. If she is getting a fair return then there is no damage.

THE COURT: A fair return on what? He says for comparable properties they are getting $200 or $300 more a summer in rental.

MR. COLIN: That doesn't prove that her return is not fair.

THE COURT: I don't think you can say she bought it for so-and-so and that she is getting seven percent on it and therefore she is not damaged.

(Continued on next page.)

(In open court.)

Q Mr. Edison, have you projected the rents received by Doralee for '76, as you testified to them, 925 a season for two-bedroom, 725 a season for one-bedroom, to a seasonal return?

MR. ORSECK: Objection. It is irrelevant. He wants to know percentage of return on investment.

THE COURT: I do not understand the question.

Do you understand it?

THE WITNESS: I understand what he is saying. I did not do it. There was no reason to do it. I was not looking for that.

THE COURT: This is spreading it over twelve months?

THE WITNESS: He was looking for rate of return on investment, I think.

Did I read you right, counselor?

Q Mr. Edison, how many mobile units are on the premises?

A Three.

Q Those are year-round facilities, are they not?

A They could be.

Q Do you know whether they are or are not?

A I don't know whether they are used year-round or

not.

Q Mr. Edison, do you think that the gross rents received at the Doralee property, to the extent you are aware of what they are, represent a fair return on the value of that property?

MR. ORSECK: Objection.

THE COURT: Counsel, I am not only going to sustain that, but I sustained that at the side bar and I regard that as an invasion of my earlier ruling in front of the jury.

MR. COLIN: I only sought to make a record.

THE COURT: You have made your record. You will make an even different record if you keep on. I ruled on that at the side bar out of the presence of the jury. This is a clear invasion of my ruling. You spoke the words that constituted that.

Let's go on to another subject.

Q Mr. Edison, are you aware of what was the condition of the Doralee premises in the year 1972?

A No, sir, I was not.

Q Are you aware of the condition of those premises as of, let's say, summer or fall of 1973?

A Counselor, I was never on the property before last year.

Q To the extent that you had an opportunity to observe the Doralee premises, Mr. Edison, did you see any circumstances on or around the area of the property that, in your opinion, affected the rental value of the facilities there?

A I sure did, sir.

Q What did you see, sir?

A Well, of course I knew what this case was all about.

Q No, no. I am asking you about what you saw at the time you were there.

A The upper and lower lake was polluted with oil when I was there last year and I assume that's the reason that has affected the value of that property.

Q What did you see when you were there?

A Oil slicks on the water.

Q In 1976?

A Last year, June of last year.

Q What did you see that you identified as oil slicks on the water?

A Oil slicks.

Q What did they look like to you?

A If you would take a picture of one it would look like the sky turned upside down and I did, in fact, take

pictures. I did, in fact, take pictures.

Q Sort of like a rainbow?

A Yes, sir.

Q You saw this on the lake there?

A Yes, sir.

Q Did you see it on the swamp adjacent?

A I didn't go up to the swamp.

Q You don't know where that oil came from, do you?

A No, sir, I do not know.

THE COURT: You have no personal knowledge?

THE WITNESS: No, sir.

Q Mr. Edison, would the fact that a tenant at a bungalow colony at a given year returned in a later year or years to rent the bungalow indicate to you a suitability or acceptability in that facility to the tenant?

THE COURT: I will sustain an objection to that.

MR. COLIN: I have no other questions.

THE COURT: Mr. Grubbs.

CROSS EXAMINATION

BY MR. GRUBBS:

Q Sir, in evaluating the rental value of the property, would you have to take into account the neighborhood in which it is situated?

A Yes, sir.

Q I take it that you inspected and surveyed the general neighborhood of where Doralee Estates is?

A Sure did.

Q When you did it you didn't observe any swamp or any marshland; is that correct?

A I didn't go into any marsh area.

Q I didn't ask you that.

Didn't you tell the prior attorney you didn't see any swamp? Yes or no?

A Yes.

Q So you didn't take that into account in reaching your conclusion; isn't that true?

A My conclusion of what they told me the rental was --

MR. ORSECK: Objection. It is self-contradictory.

MR. GRUBBS: I object to the characterization of attorney. If he has an objection --

THE COURT: You are making an objection.

MR. ORSECK: My objection is that he didn't give any conclusions. All he did was report his findings as to rents; therefore, I object to the form and content of the question.

THE COURT: Mr. Edison, you took the surrounding circumstances of the various properties in consideration in determining comparability; is that right?

THE WITNESS: Yes, sir.

THE COURT: Whether or not you took this into account or observed it or considered it as part or whether you did or did not consider it as part is fair examination here. I will overrule the objection.

Q If you didn't see it you didn't take it into account, did you?

A Absolutely not.

Q Did you walk around the Doralee Estates itself?

A Yes.

Q Did you walk around the perimeter?

A Yes.

Q Did you see any marshlands inside the perimeter?

THE COURT: Did you see any marshland anywhere?

THE WITNESS: There is some you may call marshland. It depends on your interpretation of marshland.

Q Were there spots on that Doralee Estates that had

water in it?

A Yes, sir.

Q How large an area was that that the water was in?

A I don't recall how large the area was because I was not looking for that. I was not doing comparables of land but comparables of rentals.

Q I first asked you this question: Isn't the lay of the land and the area in which the cottage is located a significant factor in evaluating what a fair rental is, yes or no?

A I didn't try to ascertain what a fair rental was.

Q I'm asking you this question, not what you tried to do.

MR. ORSECK: I object.

THE COURT: There is no foundation for that question.

Q In determining comparable property, wouldn't you have to determine whether there was marshland in the area of the bungalows?

A No.

Q You didn't consider that in determining comparable property in this case, did you?

A I was not comparing comparable properties. I am comparing comparable rentals.

MR. ORSECK: Argumentative.

THE COURT: I sustain the objection.

Q You said you selected comparable bungalows in determining rentals?

A No, I did not say that.

Q In other words, you didn't consider whether the property land was comparable in getting these figures from other bungalows; is that correct?

MR. ORSECK: Argumentative.

THE COURT: Overruled.

Q Answer that.

A I did not consider it.

Q Your statements or conclusions as to rental --

THE COURT: Just a moment, counsel.

You did not consider swamp type of things in that regard but you did say you considered whether or not there was a tennis court and whether or not there was a swimming pool?

THE WITNESS: As to a place I could use to find comparables. I would not go into an area that had all other facilities and attempt to even use that.

THE COURT: In other words, that is a starting point?

THE WITNESS: Yes.

THE COURT: Before you get to the bungalows you look at the land and the facilities and then you get to the bungalows?

THE WITNESS: Yes.

Q What about the neighborhood? Whether there is commercial establishments around? Don't you consider that in determining what is comparable property?

A That's not what I was doing.

Q Inthis case you did not consider that; is that correct?

A Not at all.

Q Did you see any oil stations along the road between Monticello and Doralee properties?

A Oil stations?

Q Yes.

A You mean gasoline stations?

Q Yes.

A I was not looking but I know of none between Broadway and Doralee.

Q Did you ever hear of the Monarch Oil Company?

A That's a distribution outfit. That's not a gas station.

Q What is a distribution project?

A When you refer to a gas station I'm talking

about a --

Q I'm not arguing with you.

MR. ORSECK: You are arguing.

THE COURT: Let's begin again. Let's not talk about arguments.

Q Give the Court and jury an opportunity to find out what this distribution station you saw is.

A I didn't say I saw one. You said I did.

Q You didn't see it?

A No.

MR. GRUBBS: Could we have the last few questions and answers read back.

THE COURT: You asked if he saw any facilities and he said he didn't know of any gas stations and you said, how about Monarch, and he said, that's not a gas station. That's where we were at before this started. I do not even know if Monarch is located between Monticello and Doralee. That is where our problem may lie.

THE WITNESS: I think so.

Q Did you see any --

THE COURT: Maybe it does not lie there. How about that?

THE WITNESS: I'm not sure.

Q You didn't look to see whether there were any

commercial establishments in the vicinity of Doralee?

A I sure didn't.

Q You didn't take that into account in determining your comparison with other bungalow colonies, did you?

A I was comparing rent rolls.

Q Just answer my question, yes or no.

MR. ORSECK: Argumentative.

THE COURT: Overruled.

A No, sir. I was not comparing bungalow colonies.

MR. GRUBBS: I move to strike everything after, "No, sir."

THE COURT: It may stand.

Q As a real estate man doesn't it make a difference, the value or the rental value or the rentals of a property depending on the nature of the community or neighborhood in which it lies?

A Is that a general question?

Q Yes.

A Yes, it does.

Q Isn't it true in this case too?

A Isn't what true?

Q That the nature of a neighborhood where the bungalow colony is situated is a factor that has relevance to determining the fair rental ofthat property?

A That in itself, no.

Q I beg your pardon?

A No, because you have good on one side and you have gorgeous apartments on the other side.

Q What if there was sewerage emptying into an area where you have a colony. Would that affect the fair rental value of the property?

A Everything affects value.

Q How would it affect value?

A If sewerage was being dumped on adjoining property?

Q Yes.

A It would have a minus effect.

Q What if the sewerage was dumped right on the property, that would have an effect on its value?

A Yes.

Q Did Doralee have village sewers?

A They are not in the village but there is a trunk line going through the property.

Q Are they connected to the trunk line or aren't they?

A I have no idea.

Q To your knowledge you don't know whether sewerage emptied into the marshlands on Doralee Estates or not?

A To my knowledge, no. I saw where the trunk line was.

Q Didn't you say this was not within the village?

A Yes, sir.

Q Isn't it true that in order to join that trunk line you have to be annexed to the village?

A No, sir.

Q Do you know whether or not Doralee's manager had been complaining because she could not get connected to the trunk line?

A I'm not aware of that.

Q You didn't know that?

A I didn't care.

THE COURT: The jury will disregard anything implicit in that question.

Q Do they permit properties with mobile homes to be annexed to the village trunk lines?

MR. ORSECK: I do not understand the question. It cannot have any relevance to the case.

THE COURT: It seems to me this is getting pretty far afield. I will sustain the objection.

Q In determining comparative bungalow colonies, wouldn't it be important to know what kind of sewerage system it had?

A Counselor, I was comparing rents.

Q Sir, in determining fair rental of properties, wouldn't it be important to know what kind of sewers the bungalows had?

A No, sir.

Q You didn't consider it in determining comparative property in this case, did you?

A No, sir. I was not doing an appraisal on the property.

Q Did you see any village barns or oil tanks in the area of Doralee properties?

A I really did not look for any. I didn't see any. I was in a hurry to do my job. I had a half a day the first day I was out there. I had to go back several days later for another half a day.

Q The answer is no?

A No, I did not.

Q You didn't consider that in selecting comparable property?

THE COURT: Did not consider what?

Q The fact that there is a village barn with an oil installation across the road from Doralee Estates?

MR. ORSECK: Not only is the question improper --

THE COURT: Is there any foundation that there is

such a thing? We have nothing of that kind in the record.

MR. GRUBBS: If your Honor please, witnesses have been put on -- I ask this be taken subject to connection.

THE COURT: Do you make any representation that you are going to prove there is a village barn with oil?

MR, GRUBBS: With an oil tank and pump, so previously testified by a party to this lawsuit.

MR. ORSECK: That is not so.

THE COURT: I do not remember hearing such a thing.

MR. GRUBBS: In a deposition. We have not come to my case.

MR. ORSECK: I represent that is a falsehood. There is no such thing in any deposition and the jury is being --

THE COURT: Enough.

MR. GRUBBS: If your Honor please --

THE COURT: Come to the side bar. That would please me most of all.

Ladies and gentlemen, why don't we take a break?

(Jury excused.)

(At the side bar.)

MR. GRUBBS: If your Honor please, this so-called expert witness has been produced prior to the plaintiff --

THE COURT: I understand. The only thing that was omitted, Mr. Grubbs, was the Doralee figures. That was the only thing that was omitted. I took the position with Mr. Colin that I thought that since those figures had already been the subject of a development here that there should be no quarrel about that. If there had been a fuss about it, I suppose I could have taken him off and let him put Mrs. Huss on and we could have done it that way. I am prepared here if you want to make a representation that there is a facility, how big it is, what it looks like --

MR. ORSECK: He made the representation.

THE COURT: That representation unhappily has been questioned. The representation about the rentals on the property was not questioned. Mr. Colin did not question that.

MR. COLIN: I don't think there was a representation.

THE COURT: Of course there was.

MR. COLIN: The representation was a so-called schedule of rents, but not specifics.

THE COURT: That's correct.

MR. ORSECK: May we go off the record?

THE COURT: No. I want to establish what it is that you want to ask this man and what is the basis for your asking the question. If you have a good faith basis for asking it, I will let you ask it.

MR. GRUBBS: Here the jury has a right --

THE COURT: Mr. Grubbs, you say there is a Village Barn with an oil facility across the street?

MR. GRUBBS: From Doralee's testimony.

THE COURT: Let's see it.

MR. COLIN: I think I have papers on that.

(Pause.)

(Recess.)

(Continued on next page.)

(In open court; jury present.)

MR. GRUBBS: If your Honor please, I would like to read testimony as to other surrounding installations around the Doralee properties in depositions and testimony given by plaintiff's counsel as a foundation for my question which was challenged.

THE COURT: Ask him about those. You represent to me that those statements are in the record. I will accept that.

Q I asked you whether or not you observed a village barn with tanks and pumps across from the Doralee properties. Did you or didn't you?

MR. ORSECK: I object on the foundation.

THE COURT: If he observed it he did and if not, he did not.

A I did not. I went right into the colony.

Q Did you drive along Cold Spring Road?

A Yes, sir. That's the only way you can enter that property from the village of Monticello.

Q Did you see any oil installations of any kind as you proceeded along that road?

A I didn't see any. I know they exist because I know Monticello. I was not looking for that on the way out there. I know they do exist.

Q But you didn't see that?

A I didn't see them that particular day.

Q Did you or didn't you?

THE COURT: When you know something is there you were not looking for and, therefore, you are not paying attention to it as you drive by.

THE WITNESS: That's what I mean.

Q Tell the Court andjury what oil installations you know are along Cold Spring Road in the area as you proceed to Doralee Estates.

MR. ORSECK: Objection.

THE COURT: In that fashion I will sustain it unless you indicate in some way that it has such an approximation as to have a bearing on any matter that this man has testified to.

Q Did you see any oil installations within a mile of Doralee Estates?

A A mile?

Q Yes.

A I guess Monarch is within a mile.

Q Monarch?

A Yes.

Q Be good enough to tell the Court and jury what that is.

A That's a distribution area for fuel oil.

Q Do you know what kind of petroleum products, what brand they distribute?

A No.

Q Do you know whether it is Gulf or not?

A I think it is but I'm not sure.

Q Are there any other gas distributors along Cold Spring Road?

A Not to my knowledge. I'm not saying there are not. I don't know.

Q Do you know whether or not there is Pargas filling plant in that area?

MR. ORSECK: I resent the question. The implication is that this is a plant. That can't be in the record --

THE COURT: That objection is sustained.

Again I tell you questions to which there are no answers are not evidence to be considered.

Q In other words you don't know whether there is or is not --

MR. ORSECK: The objection is sustained.

THE COURT: That is a new question and that can be answered.

A No, sir.

Q That being true in your selection of comparable bungalows you didn't take that factor into account one way or the other?

THE COURT: I sustain that.

MR. ORSECK: I ask your Honor to instruct the jury there is no proof that such a thing exists because it does.

THE COURT: I have already done that.

Q Do you recall having seen any other commercial establishments along Cold Spring Road in the vicinity of Doralee?

A The road is commercial.

Q I beg your pardon?

A The road is commercial.

Q In other words, the bungalow colony is located in a commercial area?

A Out toward that area, yes, sir. I think it changes right after from commercial -- it might be the village line for all I know.

Q You say it is commercial?

A It is a commercial road.

Q Is it a factor in selecting comparable bungalow units to consider whether or not this bungalow unit is located in a commercial area?

THE WITNESS: That was not my job here, your Honor. I didn't consider that at all.

THE COURT: You have selected what you regard as comparable.

Q When attorney Orsech contacted you for the first time in 1976, did he tell you there was a lawsuit pending?

MR. ORSECK: Objection. The testimony was '75.

Q In '75. I'll amend my question. When Mr. Orseck contacted you how did he contact you?

A He called me and asked me if I would do an appraisal for him.

Q Did he tell you he had a lawsuit pending and that he represented a client?

A At that particular time I don't think so. Not at that time. I learned about it of course.

Q Before you went around to bungalow cottages didn't you have to find out the reason you were going?

A He hired me for a specific reason.

Q When did you find out the purpose for which you were engaged? When for the first time?

A Some months later.

Q Did you know what the purpose of your work was?

A Actually I didn't think that was going to be the job at all. It was something completely different than I had

expected.

MR. GRUBBS: I move to strike that.

Q Before you went --

THE COURT: It will stand.

Q Before you went to the estates, did you know whether the Doralee Estates had a lawsuit pending?

A Not at that time.

Q Before you went to Doralee Estates, did you know why you were sent there?

A Yes, of course.

Q Whom did you talk to when you got there?

A I spoke with her but I had met her prior to that.

THE COURT: Mrs. Huss?

THE WITNESS: Yes.

Q When did you first meet Mrs. Huss?

A I asked Mr. Orseck to have her either in my office or his office where I could get some particulars on the job.

Q What particulars did you get from Mrs. -- I'll be more specific. Did Mrs. Dora Huss tell you she had a lawsuit pending?

A No. Not at that time.

Q Did she tell you she was making any claim against anybody?

A No, sir. As a matter of fact, she was very

close-mouthed at that time. She answered my questions and that was all.

Q When for the first time did you learn that there was a claim or suit pending?

A I suppose it was after I finished my investigation and Jerry asked me what I found.

Q When was that?

A A month or so later. I don't remember the exact date but it was not within days.

Q So when Mr. Orseck called you and asked you to do something, exactly what did he tell you?

A He told me he wanted me to do comparables on a rent roll.

Q I beg your pardon?

A He wanted me to do comparables on a rent roll.

Q When you went to these various other bungalow people to talk to, did you tell them the purpose for which you were there?

A Oh, no.

Q They told you orally what you asked them; is that correct?

A Yes, sir.

Q They had no idea of what business you had with asking that question or what purpose it was for?

A I think they had an idea, but it was a wrong idea because we had some of these places listed. I think they thought I was trying to use that to determine the value of their property.

Q When you list property and you represent them as potential sellers, do you try to elicit from them the most rosy picture of the rents that they are getting or that property is producing, to put the property in its best light?

A Absolutely. I'm a salesman.

Q Isn't it true that if you listed those properties and went around and asked them, say, how much rent are you getting on these various bungalows, they would give you a figure that would more than compensate them for what they are trying to sell?

MR. ORSECK: I object.

THE COURT: Sustained.

Q You have sold bungalow units?

A Yes.

Q One of the first questions they ask you is what is the rental income from it?

A Absolutely.

Q You have listed two or three of these properties you say is comparable for sale and if you ask them what the

rental income was on those, wouldn't you expect to get something that would help you sell the properties?

MR. ORSECK: Objection.

THE COURT: There is something the matter with that question. I will sustain the objection.

Q As a real estate broker isn't it true that one of the most important items in selling a rental property is to find out how much rental that property produces?

A The most important? No, sir.

Q Isn't that one of the most important?

A One of them but not the most important.

Q The income that that property produces is not one of the most important?

MR. ORSECK: Judge, that is not fair.

THE COURT: That is what he said.

Q It is one of the most important?

A Yes. One of them.

Q You went to three of these places you had listed and you asked that question as to their rental income from the various units; isn't that true?

A Yes, sir.

Q You didn't check any of their books?

A No, sir.

Q You depended on what these fifty people told you;

isn't that true?

A Yes, sir.

Q If the information they gave you was incorrect, your conclusion is incorrect, isn't that true?

MR. ORSECK: Your Honor, I object to the form of the question. Obviously his testimony would be incorrect and not his conclusion. All he did was to report what was told to him.

THE COURT: I think he understands what the question calls for. Objection overruled.

A I didn't draw any conclusions at all.

Q Didn't you state certain figures from data from other people?

A Yes, sir.

Q If the information they gave you was incorrect, the information you gave this Court and jury is incorrect; isn't that true?

A Yes.

Q Isn't it true that if a buyer comes to you, you do something more than go out and ask a seller how much he makes?

A No, sir.

Q You don't do any more investigation as to the income produced by that property?

A Me as a broker?

Q Yes.

A No, sir.

Q Doesn't the seller ask you for some more specific proof than what they say the property produces?

A The seller?

Q The buyer.

A He doesn't ask me.

Q Does he ask you to produce that from your client who is trying to sell the property?

MR. ORSECK: Objection.

THE COURT: Overruled.

(Record read.)

A He doesn't ask me.

Q You mean a purchaser does not ask you for the income?

A Yes, sir, he does.

Q And doesn't he ask you some evidence of what income he receives from the various rental units?

A He'll ask the seller but not me.

Q What does the seller produce?

A His books.

MR. ORSECK: I object.

THE COURT: Overruled.

Q What does the seller produce?

THE COURT: He said he produces his books if they get down to negotiating a sale. The broker does not do that but the seller does that, if they get down to a sale.

Q Isn't it true when you, as a broker, advised a client to buy one piece of property over another one or making a selection and assisting your client in purchasing a piece of property, don't you investigate what the income producing history of that piece of property is?

A 99 times out of 100 we represent the seller. The seller is our client and not the purchaser.

Q Do you ever run into a purchaser who wants to know the history of the income of that piece of property?

MR. ORSECK: Objection.

THE COURT: Sustained. We are getting a little far afield.

Q Do you know whether this particular piece of property, Doralee Estates, had been previously operated before Doralee took title at a loss or not? Do you know that?

THE COURT: I do not understand what the question is.

(Question read.)

THE COURT: I sustain the objection.

Q Do you know whether or not that bungalow colony

purchased by Doralee was even in operation as a bungalow colony when she bought it?

THE COURT: I sustain that objection.

Q Did you observe any of the residences in the area of the Doralee Estates?

A I think I did see some on Waverly Avenue.

Q Did you see any rundown houses?

A Possibly. I don't recall.

Q I show you this exhibit. Did you see any of the houses that looked like that? Did you see that house?

A Not to my knowledge.

MR. GRUBBS: I am referring to Exhibit E-22 in the Supreme Court --

THE COURT: Let's mark this for identification.

xxx (Defendant's Exhibit D marked for identification.)

THE COURT: You do not remember seeing it?

THE WITNESS: No, sir.

Q Did you see this area when you were in the vicinity of Doralee Estates?

A This is not on Cold Spring Road.

MR. GRUBBS: Could we have this marked.

xxx (Defendant's Exhibit E marked for identification.)

Q Did you observe this installation along Cold Spring Road?

MR. ORSECK: Your Honor, I object to characterization.

THE COURT: I sustain that.

Do you recognize anything in that picture?

THE WITNESS: I don't recognize it.

THE COURT: Mark it for identification.

xxx (Defendant's Exhibit F marked for identification.)

THE COURT: Use that form in asking future questions.

Q Do you recognize anything in this photograph, sir?

MR. COLIN: I think the exhibits are being marked in a consecutive sequence for the defendants whereas this is the third-party defendant. There may be a little confusion from the marking as it is now being applied.

THE COURT: I do not think the jury will be confused in that sense. I understand your point.

A I think I did see this one.

THE COURT: The area represented by that picture.

xxx (Defendant's Exhibit G marked for identification.)

MR. ORSECK: Although it was not offered, if he

saw it it can be received in evidence.

MR. GRUBBS: We have a stipulation on these already.

MR. ORSECK: We have no stipulation.

THE COURT: He is in the middle of examination. You stand up and offer something and he makes a remark to you and we do not get anywhere.

Q Did you see that when you visited Doralee Estates?

A I don't recognize it. It may be there but I don't recognize it.

MR. GRUBBS: Could we have that marked.

xxx (Defendant's Exhibit H marked for identification.)

Q Do you recognize anything in this photograph when you visited the premises of Doralee?

A That looks familiar.

MR. GRUBBS: May we have this marked.

xxx (Defendant's Exhibit I marked for identification.)

Q Could you tell me whether or not the bungalows you saw at Doralee Estates looked like this?

A Not in June when I was there. It could be Woodlawn though, or maybe even East Pond.

Q You don't recognize it?

A No.

You are talking about the buildings?

Q The bungalow itself.

A The bungalow is typical of the ones I was describing.

Q Limit yourself to my question.

MR. ORSECK: That was responsive.

THE COURT: I will permit that to stand.

Q Did you see that bungalow when you were at Doralee Estates?

A That particular one? I don't know.

MR. GRUBBS: Mark that.

xxx (Defendant's Exhibit J marked for identification.)

Q Did you see this when you were visiting Doralee Estates?

A That's typical of all the ones I described.

MR. GRUBBS: I move to strike that.

MR. ORSECK: There is a motion before the Court. The jury might get the impression --

THE COURT: All right, counsel, never mind. I will permit the answer to stand.

Q Take a look at this. Did you see anything of that

nature along Cold Spring Road when you visited the Doralee Estates?

A I don't recall that.

xxx (Defendant's Exhibit K marked for identification.)

xxx (Defendant's Exhibit L marked for identification.)

Q To clear the record, I show you Exhibit L for identification and I ask you whether you saw this when you visited Doralee Estates?

A I was there in early summer. Of course there was foliage on the trees. But this is typical of what I used as a comparable so it may have been.

Q Do you know or not?

A I do not know as to that particular one.

Q Take a look at this.

A No, sir, I did not see this.

MR. GRUBBS: May that be marked.

xxx (Defendant's Exhibit M marked for identification.)

Q I believe you testified that you never had testified at any time for Mr. Orseck before; is that correct?

A That's correct.

Q Had you ever had any contact with Mr. Orseck or

his office before?

A No.

Q When he called you up did he tell you what you were going to be paid for doing this work for him?

A I told him what I was going to be paid.

Q How much?

A My appraisal fee for this would be $250 plus $100 a day for court appearance plus expenses.

Q You told him that when he called you up?

A Yes. I asked him if his client was willing to pay my fee.

Q So you knew when he called you up there was likeness of there being a court appearance in this?

A I wanted to make him aware if there was what my fees would be.

Q In other words, you thought there was a good chance this had some connection with a litigation matter?

A I had no idea whatsoever at that time.

Q But you gave him a fee for it anyway; is that correct?

A I told him what my fees were.

MR. GRUBBS: Thank you.

REDIRECT EXAMINATION

xxx BY MR. ORSECK:

Q Mr. Edison, these pictures -- I don't know what the numbers are -- is it true that the buildings surrounding the areas of all the other bungalow colonies which you listed as comparables look substantially like these pictures do?

MR. COLIN: I object to that.

MR. GRUBBS: I object to that.

MR. ORSECK: I think it is a pretty good question, Judge.

THE COURT: He has answered that four or five times, so I see no harm in overruling the objection.

Go ahead.

A They are comparable.

Q Just what is comparable, so the jury understands the question and the answer?

A Well, if you have two houses that are similar, very close to being the same thing, not necessarily the same thing but close to being the same thing, no places are identical, no places -- but --

Q I want to cut you off. Evidently I am the only one who understands my question.

I am talking about the pictures other than the

bungalow pictures that you just looked at. I am talking about the buildings that Mr. Grubbs said: did you along the highway see this house or this building?

To some you said, "I may have," and to others you said you didn't. It is those pictures that I am talking about.

Do you understand me?

A Yes.

Q My question to you is this: Are those same types of buildings in the surrounding areas of the other bungalow colonies which you testified were comparable?

MR. COLIN: Objection. Leading.

THE COURT: Overruled.

A Yes, sir.

Q So how those other buildings looked, that has nothing to do with Doralee except they are in the vicinity; that has no bearing on whether or not in your judgment the bungalow colonies were comparable?

THE COURT: I sustain an objection to that as to form.

Q Were the areas and the buildings, types of buildings, surrounding the areas of the other comparable bungalow colonies substantially the same as the ones shown to you in these pictures?

MR. GRUBBS: I object.

THE COURT: In terms of roads and open spaces and conditions of those buildings?

MR. ORSECK: Yes.

THE COURT: Overruled.

You may answer.

A Yes.

Q You were in court all day yesterday?

A Yes, sir.

Q Were you in court all day today?

A Yes, sir.

Q Did you hear Mr. Ted Hudson testify?

A Yes.

Q Did you hear me read exhibits to the jury, portions of exhibits?

THE COURT: Don't do that. This is getting you nowhere. Put fact questions.

Q On the basis of what you have heard here in court today, do you have a conclusion as to the reason for the disparity in rents at Doralee in comparison to the rents of the other bungalows which you said were comparable?

MR. GRUBBS: Objection.

THE COURT: I sustain that. You have a hypothetical with no facts in it.

Frankly, this is something that was convered on direct or covered elsewhere in his testimony. I sustain that.

Q You told us about Colonial Hill Apartments?

A Yes.

Q Is there also a Colonial Hill residential area?

A Yes.

Q How would you classify the Colonial Hill residential area with respect to price or value of homes all over Sullivan County?

MR. COLIN: Objected to. It is not relevant.

THE COURT: Where is it?

THE WITNESS: Adjacent.

THE COURT: To Doralee?

THE WITNESS: Yes.

THE COURT: Overruled.

MR. ORSECK: I withdraw the question and I will reframe it.

Q Do any of the comparable bungalow colonies abound residences comparable to those in the Colonial Hill residential section?

MR. GRUBBS: Objection.

MR. COLIN: Objection.

THE COURT: I thought you were doing better with the first question.

MR. ORSECK: I will try again.

Q Were there residential areas adjacent or very close to any of the other four bungalow colonies which you found to be comparable?

A Oh, yes.

Q How did those residential areas compare to the Colonial Hill residential area which was adjacent to Doralee?

MR. GRUBBS: Objection.

THE COURT: Overruled.

A The other areas compared to that? On a minus scale of 50 percent.

Q To be more explicit, you are saying that the Colonial Hill residences were higher in value than the ones adjoining --

MR. GRUBBS: Objection, your Honor.

THE COURT: I think what you are getting at is if the homes are of a better quality the land is worth more.

THE WITNESS: There is no nicer complex in Sullivan County.

THE COURT: Than those homes adjoining Doralee?

THE WITNESS: Yes.

Q As you proceed down Cold Spring Road past Doralee from Monticello, is it a fact, referring to Plaintiff's

Exhibit 1, that the land becomes lower and lower and lower?

A Yes. Absolutely.

MR. ORSECK: No further questions.

THE COURT: Is there anything further?

(Pause.)

THE COURT: You are excused.

(Witness excused.)

MR. COLIN: Your Honor, may the witness stay on until tomorrow? We have not had available the specific --

THE COURT: Talk to me at the close of the day.

MR. COLIN: May the witness be kept available until tomorrow, your Honor?

THE COURT: You have concluded your cross-examination of him. We heard cross-examination from both defendants and we heard brief redirect. I see nothing further that is necessary. I gave you an hour recess to prepare your cross-examination.

MR. COLIN: That was the lunch period.

THE COURT: Do you have another witness?

MR. ORSECK: I would respectfully advise the Court that the plaintiff's case, the remains of the plaintiff's case, consists of one deposition and Mrs. Huss. I would request that I finish the deposition testimony and then, perhaps the first thing in the morning, we can --

pgem

THE COURT: Let's see how long it takes you. We started late this morning.

MR. ORSECK: May I proceed, your Honor?

THE COURT: We're going to have read the deposition of Joseph G. Spodaryk. He was duly sworn and gave testimony on June 18, 1974. He was apparently in some way connected with the New York State Department of Environmental Conservation in Avon, New York. All counsel were present.

MR. ORSECK: I was about to indicate that Mr. Grubbs' office was not present though they were noticed for the deposition.

THE COURT: Notice was sent to them but they did not appear.

MR. ORSECK: Both Mr. Colin and I traveled to Avon, New York, which is near Rochester, and the deposition was conducted at the Avon State Laboratory.

These are my questions to Mr. Spodaryk:

"Q Would you give us your full name and home address?

"A Joseph G. Spodaryk. My home address is 49 Winstead Road, Rochester.

"Q Would you state your current present employment?

"A I am employed by the Department of

Environmental Conservation of New York as an associate analytical chemist.

"Q How long have you held that position?

"A The associate position, since 1970.

"Q All right. And what was your occupation prior to that date?

"A I have been employed by the Conservation Department since 1967.

"Q And in what capacities were you employed from '67 to '70?

"A First as an analytical chemist and then as a senior analytical chemist.

"Q Would you state your educational background?

"A I have a Bachelor of Science degree in chemistry from Siena College, which is in Lowdenville, New York, and attended graduate school for two years at the Rochester Institute of Technology.

"Q Were your duties in 1972 substantially the same as they are today?

"A Yes.

"Q What were your duties in or about the spring and summer of 1972?

"A I was an associate analytical chemist at

the time. And the main responsibilities of the unit which I am in is to investigate fish kills in the State of New York.

"Q How long have you been investigating fish kills?

"A Since I first started my employment with the Department.

"Q Might you estimate for us the number of fish-kill studies that you have performed during your tenure with the Department of Environmental Conservation?

"A Probably in the neighborhood of 125 to 150. I can't give you an exact number. I have an idea of how many we do a year and about how many I go out on -- over a seven-year period that would be pretty close.

"Q Now, in April, and thereafter in 1972, did you perform a fish-kill study regarding and pertaining to property and waters owned by Doralee Estates in the Town of Thompsonville, County of Sullivan?"

"MR. COLIN: Would you fix the date more precisely, please?

"Q Could you tell us when this particular

study began and when it ended?

"A We made our investigation on April 20, 1972.

"Q Was that at the site?

"A Yes.

"Q Now, do you have an independent recollection as to who from your department was physically present on the site at that time?

"A Myself, Mr. Manley, who was employed as a conservation biologist at the time, and Environmental Conservation Officer Frank Schlant.

"Q Do you have any independent recollection as to what precipitated the study -- what caused you to come down to Monticello?

"A Officer Schlant notified Mr. Copper of unit of a fish kill which was taking place."

MR. COLIN: Your Honor, in view of the dates involved, I would object to the reading of any further portions of this deposition.

THE COURT: It is overruled.

MR. ORSECK: I continue:

"Q Now, on the site, what did you do?

"A We inspected the area around the ponds and around the Monticello Gas & Oil Company with

Officer Schlant. He had inspected the area and taken samples earlier that day.

"Q Now, were samples taken in your presence at that time?

"A Yes.

"Q Were notes made by you or by Mr. Manley, under your supervision, as to the locations of the places where the samples were taken?"

E11 THE COURT: The objection is overruled.

MR. ORSECK: I continue.

"A Yes.

"Q What else did you do?

"A At the site?

"Q Yes.

"A Besides taking samples I just discussed the situation with Officer Schlant. We ran a routine developed oxygen determination, took the temperature of the water and secured the samples which he had taken earlier in the day.

"Q Would you tell us what the samples were and how they were taken?

"A The samples were stream samples or samples from the ponds, or from the water flowing into the water course above the Doralee Estates. They were

just simply grab samples.

"Q Did you detect oil upon or in the Dora-lee Ponds?"

THE COURT: The objection is overruled.

MR. ORSECK: I continue:

"A There was an oil film visible on the surface of the water, yes.

"Q Which you could see and which you did see?

"A Yes.

"Q Did you trace the source of the oil?

"A We inspected the areas around the ponds, first the lower pond and then the upper ponds, and we then proceeded to the area around the Monticello Gas & Oil Company and proceeded across the street where a culvert enters into a swampy upstream of the ponds.

"Q Did you see dead fish?

"A There were dead fish in the lower pond.

"Q After the inspection was a report made by you or under your supervision?

"A Yes."

THE COURT: Objection overruled.

MR. ORSECK: I continue:

"Q Was it made by you?

"A Yes.

"Q Now, in response to an earlier question you testified that you estimated the number of fish-kill studies that you have made being around 125, that is more or less correct, is it not?

"A Yes.

"Q And in each one of those studies did the study culminate in a written report?

"A Yes.

"Q And is it the ordinary course of your business to make a report following a fishkill study made by you?

"A Yes.

"Q And, in fact, is it a requirement of the duties that you perform to reduce your study to a final report?

"A Yes, it is our normal routine to write a report on our investigations.

"Q Did you make a report as a result of your study at the Doralee Estates?

"A Yes.

"Q I show you what now has been marked as Plaintiff's Exhibit 1 for identification, and for the record purpose, this exhibit might have been marked

Plaintiff's Exhibit 2 during a deposition of John Kwak on October 26, 1973; and I ask you to look at it, would you do so?"

THE COURT: Rather than get into all of this, are you going to offer the exhibit? Mark it with our exhibit number and offer it in evidence.

MR. ORSECK: I believe the only full copy is the one that I furnished your Honor with the deposition.

THE COURT: You are offering it?

MR. ORSECK: Yes.

THE COURT: Show it to Mr. Colin.

(Pause.)

THE COURT: Is there an objection?

MR. COLIN: I believe Mr. Orseck has combined all the exhibits that were taken on this deposition and offered them rather than just the document which was marked at the particular time we are at now.

MR. ORSECK: If I did it is unintentional.

MR. COLIN: I don't think you intended to do anything improper.

THE COURT: Does that create a problem?

MR. COLIN: It does not, except in the later reading of the deposition the other exhibits, of course, were identified at later points. Other than that, I do not think

there is any problem. However, my notes on the deposition show that the deposition ends with 2-H, and there appears to be more than that attached here.

(Pause.)

MR. ORSECK: Mr. Colin, would you consent to all the exhibits being offered as one exhibit? In other words, they were introduced separately during the course of the deposition, but the offer that is being made is the file of the New York State Department of Environmental --

THE COURT: Do you have any problem with your identification in your relationship to the testimony that you would read? Are they marked on their face?

MR. COLIN: They are marked on their face.

THE COURT: We can use the sub markings for this Court's marking. When you come to a later exhibit, if he refers to it as 2-E, we will call it 2-E, part of this exhibit.

MR. COLIN: What I would suggest is that we mark one as an exhibit under its own marking and then 2-A to 2-H as another exhibit.

THE COURT: We will do that.

Do you have any objection, Mr. Grubbs?

MR. GRUBBS: No objection.

THE COURT: Exhibit 26 is received consisting

of Exhibit 1 on this deposition.

MR. ORSECK: We have an unfortunate dispute over nothing which I think has to be solved.

MR. COLIN: If it is over nothing --

MR. ORSECK: You say that that is not part of it?

MR. COLIN: I say it was not marked on the deposition. The deposition index, Mr. Orseck, shows Exhibit 1 and then Exhibit 2-A.

MR. ORSECK: I don't want to argue except at t he side bar.

THE COURT: Where is Kwak 2?

MR. ORSECK: That's the one he's disputing.

THE COURT: Let's mark Kwak 2 as number.

MR. COLIN: May I follow the markings that are being made?

MR. ORSECK: Mark them the way you want and then we will have no dispute.

THE COURT: We have one marked as 26, and that is Spodaryk 1, and 27 is 2-A through H, and 28 will be Exhibit Kwak 2, which is identified at page 10 of the deposition of Mr. Spodaryk.

Let's go forward on that basis.

You are reading from page 10. Proceed.

(Plaintiff's Exhibits 26, 27, and 28 were received in evidence.)

xxx

MR. ORSECK: I will continue:

"Q Would you tell us where the original of the report is?

"A The original is in our Bureau's file in Albany."

MR. ORSECK: Your Honor, I do not believe it would be proper for me to read the other questions because they relate to exhibits which are not now in evidence.

I therefore offer them in evidence, your Honor.

THE COURT: Which exhibits? They are all admitted. Exhibits 26, 27, and 28 are all in evidence.

MR. ORSECK: I'm sorry. I will continue reading:

"Q There was one page of the report which is entitled 'Sketch not to scale'. Would you tell us what is meant where the word 'sample' appears a number of times on that page with circled numbers following the word 'sample'?

"A Those are the locations where the unit, under myself or Mr. Manley or Officer Schlant had taken samples that day."

MR. ORSECK: I would appreciate a minute to show

the jury the document.

THE COURT: Very good.

(Pause.)

MR. ORSECK: I continue:

"Q Now, were those samples tablulated as schedules or charts in the report?

"A Yes.

"Q And in the report, on the tabulation or charts, is it indicated what the samples indicated after testing?

"A Yes."

MR. ORSECK: Let the record indicate that by the term "tabulations" counsel agree that what we are referring to are the two pages in the report just marked in evidence, each of which is entitled "Cold Spring Park MGO Corporation, Monticello, April 20, 1972," below which appears ruled-off boxes containing data pertaining to the samples.

With the Court's permission I will read it. It will take half a minute.

(Mr. Orseck read to the jury from Plaintiff's Exhibit 28 in evidence.)

MR. ORSECK: I continue reading:

"Q Would you tell us what physically was done with the samples, Mr. Spodaryk?

"A As far as testing is concerned?

"Q Yes. Why don't you tell us how they were taken and what they were put in?

"A As I indicated before, they were grab samples taken at the locations noted. They were returned to the lab and kept under refrigeration until they were tested. Portions of the samples were extracted with trimethylpenthane."

MR. ORSECK: I now turn to page 13, line 5:

"Q Mr. Spodaryk, the report refers to 'Bioassay tested results'. Will you tell us what they were?

"A The Bioassay test is a toxicity test and involves fish usually a minnow, to a measured portion of a water sample."

MR. ORSECK: I now turn to page 17, line 5:

"Q Did you see any dead fish on any other date?

"A Yes, I saw dead fish on April 20th.

"Q Where did you see the dead fish?

"A They were in the lower pond on the property of the Doralee Estates.

"Q What kind of fish were they?

"A They were pan fish and minnows.

"Q How many?

"A It was estimated at approximately 2,000.

"Q How many did you see, Mr. Spodaryk?

"A I can't give you a specific number.

"Q Give me any number, as well as you can fix it?

"A Probably in the neighborhood of several hundred.

"Q You saw several hundred dead fish?

"A Yes.

"Q How did you determine the number of dead fish?

"A The number that is listed on the form?

"Q How did you determine in your answer just given to me the number of dead fish?

"A As best as I recall our observation of the pond, and we did count some fish on that day.

"Q How many did you count?

"A Again, in the area of several hundred."

MR. ORSECK: May the record indicate that this is Mr. Colin asking questions and not me.

THE COURT: Yes.

MR. ORSECK: I now turn to page 32. These are questions that Mr. Colin was asking:

"Q You have also made other tests of waters involving the presence of oil, haven't you?

"A Yes.

"Q Have you ever seen a public highway or an asphalt paved parking lot in which you detected, by the naked eye, the presence of oil on water when the surface was wet?

"A Water in the parking lot or on the highway?

"Q Have you ever seen an asphalt paved highway or an asphalt paved parking lot where the surface is wet, and which by visual inspection you are to determine that there is oil present on the water?

"A Yes, I guess so.

"Q And that water comes from the fact that motor vehicles transverse the paved area, isn't that so?

"A The water comes from --

"Q No, your observation of oil arises from the fact that motor vehicles transverse the paved area?

"A I would assume so."

MR. ORSECK: I now turn to page 38. Mr. Colin is asking the questions. Line 12:

"Q Isn't a fact, sir, that the oil content shown on your test was so slight that it had no

arithmetic content?

"A No."

MR. ORSECK: Mr. Colin asked another question on page 48:

"Q Mr. Spodaryk, do you know that Mrs. Huss, who is the president of the Doralee Corporation, complained of sewage pollution in her ponds by adjoining properties?

"A No.

"Q I'll show you a copy of a letter that has been marked as Exhibit 6 on the Kwak deposition and direct to your attention that the letter is addressed to the Department with which you are connected; do you see that at the head of it, sir?

"A Yes."

MR. ORSECK: Let the record indicate that the exhibit to which he is referring is dated September 20, 1972.

I now turn to page 49, line 5:

"Q Did you observe any presence on the Doralee ponds of a scum or similar indication of sewage entering the waters?

"A No."

MR. ORSECK: Page 51, at the top:

"Q What is the effect of E. coli bacteria

on fish and living organisms?

"A I don't know what the affect on any living organism is. I don't believe it had any affect on the fish."

MR. ORSECK: Page 53. This is Mr. Colin's question:

"Q Mr. Spodaryk, I'm going to show you some papers and ask you to look at them and tell me if you are able, who was the person or by what public department these papers were prepared?"

THE COURT: He says he doesn't see them so what is the point of that?

MR. ORSECK: I now go to page 55. These are my questions.

"Q In reference to the notes of your report, on the day you were there you noticed that the areas around the culvert were soaked with oil, is that true?"

THE COURT: Overruled.

MR. ORSECK: I continue:

"A Yes, under the tanks at the Monticello Gas & Oil Company.

"Q All right. Now, you also found that oil-soaked ground was evident at the entry of the culvert carrying water runoff from the area of the Monticello

Gas & Oil Company into the swamp, did you not?"

THE COURT: I overrule that.

MR. ORSECK: I continue:

"A Yes.

"Q Now, in the notes which were marked, the series 2-A to H, there is a finding that there were no other causes of pollution found other than the oil; is that correct?"

MR. COLIN: Same objection, your Honor.

THE COURT: I am going to cut that answer off at line 23; is that agreeable?

MR. COLIN: The objection is sustained at that point?

THE COURT: As to hearsay input. Is that agreeable?

MR. COLIN: Thank you, sir.

THE COURT: Read the answer down to line 23.

MR. ORSECK: I continue:

"A We did not observe the entry of oil from any other source."

MR. COLIN: You are admitting it to that point, your Honor?

THE COURT: Yes.

MR. ORSECK: I now turn to page 56, line 2:

"Q Now, do you remember that it was raining quite heavily the day you were there and the day before?

"A Yes, it was raining.

"Q How about the day before -- your notes indicate that it was?

"A I believe it had rained the day before also.

"Q Do you also remember that there was a spillway off the lower pond?

"A Yes.

"Q Now, oil, of course, rises to the surface, does it not?

"A Yes.

"Q Is it fair to conclude that a given quantity of oil on a water surface following and during a rainstorm would run off a spillway at the lower end of the water reservoir?"

THE COURT: What is the basis of that objection?

MR. COLIN: The basis is the form of the question. It is a leading question and it contains its own conclusions.

THE COURT: I will overrule that.

MR. COLIN: There is no qualification for the witness with respect to the subject matter.

THE COURT: He testified he was involved in 125 fishkill investigations.

MR. COLIN: Not as a chemical or toxic engineer, your Honor.

THE COURT: I will permit it.

MR. ORSECK: Line 18:

"A If the oil is on the surface and there is an exit for it it will flow off with the water.

"Q In your opinion was the condition of the water the same on the 20th as it was two or three days before the rain?"

THE COURT: He doesn't answer that. I sustain that. I looked over to page 57. He says he only knows what he saw on the 20th.

MR. ORSECK: Line 7, page 57:

"Q Would a lot of rain improve the water in so far as a home atmosphere for fish are concerned?

"A Not necessarily, no.

"Q Would rain in large quantities, given a set quantity of oil in the water, have an affect of lessening the impact of oil on the fish environment?"

THE COURT: Overruled.

MR. ORSECK: Line 14:

"A Yes, I would think so, the water would be diluted."

MR. ORSECK: That's all in so far as the reading goes.

THE COURT: Do you want to reserve until the morning the right to read any other portions?

MR. COLIN: I would appreciate that, your Honor.

THE COURT: We will be in recess until ten o'clock tomorrow morning.

Do not discuss the case amongst yourselves or with anybody else. Keep an open mind.

(At 4:40 p.m. the proceedings were adjourned to January 6, 1977, at 10:00 o'clock a.m.)

- - -

#12

DORALEE ESTATES, INC.,
vs.
CITIES SERVICE OIL CO., 73 Civ. 907
vs.
MGO CORPORATION

January 6, 1977
10:00 a.m.

(Jury in box.)

THE COURT: Good morning. Thank you for your patience. We were dealing with matters of law which are not of concern to you. You are triers of the facts and do not have to deal with the problems of the law.

MR. ORSECK: The plaintiff calls Dora Huss.

MR. COLIN: I have not yet read the cross-examination on Spodaryk, which I would like to do.

THE COURT: Mr. Grubbs, may the record show you have something you want to bring to my attention, and we will do that at the first recess.

MR. COLIN: May it please your Honor, and ladies and gentlemen of the jury, this is the cross-examination conducted on our part in the Spodaryk deposition which Mr. Orseck read from in yesterday's proceedings.

I turn to page 12, line 20:

"MR. COLIN: May I clarify something for the record? When we are talking about samples, are we talking about water samples?

"A Yes.

"MR. COLIN: Not fish samples, but water samples?

"A Yes."

MR. COLIN: Proceeding now to page 17, line 5:

"Q Did you see any dead fish on any other date?

"A Yes, I saw dead fish on April 20th.

"Q Where did you see the dead fish?"

MR. ORSECK: Excuse me. This entire page was read by me. It is repetitious.

THE COURT: I recall that being read.

MR. COLIN: Your Honor, in order to maintain a continuity in context it is necessary to read this brief portion. It leads into other material, and I think the other material would be contextually difficult to understand without this.

THE COURT: Go ahead. Try to minimize the reading.

MR. COLIN: I continue:

"Q Where did you see the dead fish?

"A They were in the lower pond on the property on the Doralee Estates.

"Q What kind of fish were they?

"A There were pan fish and minnows.

"Q How many?

"A It was estimated at approximately 2,000.

"Q How many did you see, Mr. Spodaryk?

"A I can't give you a specific number.

"Q Give me any number, as well as you can fix it?

"A Probably in the neighborhood of several hundred.

"Q You saw several hundred dead fish?

"A Yes."

MR. COLIN: Turning now to page 18, line 11:

"Q Now, with your experience, Mr. Spodaryk, when an event which you call a fish kill occurs is that usually the result of some special incident or circumstances?

"A I would say, usually, yes.

"Q In other words, some noxious substance inimical to the life of fish, on this particular occasion in time, has entered the waters where the fish are, is that right?

"A Yes."

MR. COLIN: Now I turn to page 20, line 21:

"Q Now, Mr. Spodaryk, the dead fish that you observed were recently dead, recently killed, weren't they?

"A Yes."

MR. COLIN: I now turn to page 21, line 1:

"Q So you agree, do you not, that they were alive prior to the fishkill incident observed on the 19th or the 20th?

"A Yes, I would have to presume they were alive.

"Q And would you agree that if they were alive prior to the fishkill incident that the waters in which they were swimming were not sufficiently polluted to cause their death, they maintained fish life, is that right?

"A Yes.

"Q And if you saw fish in large numbers you would agree that the waters maintained fish life in large numbers, is that correct?

"A Yes."

MR. COLIN: I turn now to page 22, line 4. This question refers to the exhibit of Mr. Kwak of the Department of Conservation that has hertofore been marked in this case:

"Q Now, in the first page of the report it says 'Static Laboratory Bioassay run on the stream samples did not cause mortality of the test minnows'. Did you follow those words as I read them, Mr. Spodaryk?

"A Yes.

"Q Now, is it correct that the statement means that your department put test minnows, healthy minnows, into the samples that were taken from the Doralee ponds?

"A Yes.

"Q And is it correct that they were, 'they' meaning the minnows, were left in those waters for a certain period of time in the course of your experiment and observation, is that correct?

"A Yes.

"Q And that is a period of time that your department has established as a controlled experiment to determine the harmfulness of waters to fishlife, is that correct?

"A Not exactly. Routinely on investigations we expose fish to portions of the samples, as you stated, and we observe them to see the effects.

"Q Don't you expose them for a controlled period of time?

"A Usually we leave them exposed for at least three days.

"Q So these minnows on the bioassay test conducted by your laboratory were in the samples taken from the Doralee ponds for three days, correct, sir?

"A Yes. I believe most of them were exposed for at least that period of time.

"Q Some longer, then, is that right?

"A Yes.

"Q And after that exposure you observed that all of your test fish survived the period in which they were left in the sample water, is that correct?

"A Yes."

MR. COLIN: Going to page 24, line 20:

"Q Now, certin of the water samples were taken according to what you were told by others, by Officer Schlant, who was connected with the same department you are in?

"A Yes.

"Q And did Officer Schlant tell you he took water samples?

"A Yes.

"Q And did he tell you he took them on the same day that he saw dead fish in the waters?

"A Yes.

"Q Did you take any samples yourself, meaning water samples?

"A Yes, I believe I did.

"Q Do you have any notes that would indicate

whether or not you did?

"A Yes, I do.

"Q May I ask you to refer to your notes and then tell me to the best of your recollection whether you yourself took water samples?

"A I believe I just took one sample myself.

"Q Did Mr. Manley take any samples?

"A Yes, he did.

"Q Did you see him take them?

"A Yes.

"Q That was on the 20th of April, right?

"A Yes.

"Q Now, Mr. Spodaryk, you kept records of the bioassay test that you made by putting fish into the water, did you not?

"A Yes. I believe the tests were carried out by Mr. Manley.

"Q And you have his notes? Those are the notes of which you furnished me copies, is that right?

"A Yes.

"Q And you participated in the testing that he did?

"A I observed him.

"Q Now, let's go to page five of your notes.

1 You see it there?

2 "A Yes.

3 "Q All right. It says on the sample, under

4 caption No. 6, the fish was placed in the fluent from

5 the lower pond, is that correct, sir?

6 "A Yes.

7 "Q And you conducted a test for 144 hours,

8 is that correct, sir?

9 "A Yes.

10 "Q And that's six days, is it not?

11 "A Yes.

12 "Q And the fish was put in alive and normal?

13 "A Yes.

14 "Q And the fish was removed alive and normal

15 is that correct?

16 "A Yes."

17 MR. ORSECK: Your Honor, to save any trouble,

18 the next three questions should be read. I am referring to

19 page 27, line 10.

20 MR. COLIN: I didn't mark them for reading.

21 MR. ORSECK: In the spirit of fairness they

22 should be read.

23 MR. COLIN: Mr. Orseck has read from this

24 deposition as he chose.

25

THE COURT: You may read those later.

MR. ORSECK: All right.

MR. COLIN: I turn now to page 28, line 1:

"Q Okay. All right. Let's go to the second test. The fish was in distress for some period of time, is that right?"

MR. ORSECK: Your Honor, I now state that it makes no sense --

MR. COLIN: Mr. Orseck, just to save time and to spare interruption, I will read what you asked me to read.

THE COURT: Start at line 10 on page 27.

MR. COLIN: Yes, your Honor.

MR. ORSECK: Thank you.

MR. COLIN: I continue:

"Q Now, the next test, right under that one in your notes -- the fish was put in distress, is that right?

"A No. The fish was put in -- a healthy fish was put in. The comment is that he was in immediate distress upon putting him in the samples.

"Q Your Notes don't show that the fish was alive and normal as to this particular test, do they?

"A All the fish are alive and normal when they are placed in a bioassay.

"Q You didn't answer my question, Mr. Spodaryk. on the notes relating to the fish, about which you previously testified, your notes say that the fish is alive and normal at the start, don't they?

"A No, it does not.

"Q Okay. All right. Let's go to the second test. The fish was in distress for some period of time, is that right?

"A Yes.

"Q ANd the fish was removed alive and normal after 144 hours, is that right?

"A Yes.

"Q Now, let's go to the third. The fish was in distress, and after 144 hours was alive and normal, is that right?

"A Yes.

"Q And then the next test, page 6, that appears in your notes shows the fish alive, alive and normal; we removed it 144 hours later, is that right?

"A No.

"Q I am looking at page 6 from the notes.

"A The comment is -- that the fish was alive at 8:30 a.m. on April 24th."

MR. ORSECK: Excuse me.

pgem "Spodaryk

Your Honor, the reason that I did not read this -- and myobjection is well taken --

MR. COLIN: I object to this interruption.

MR. ORSECK: I object to this reading. All it is is a discussion of a document in evidence which speaks for itself. That's the basis of my objection. That document says what it says, Judge.

THE COURT: The document is already in evidence

MR. ORSECK: Yes, your Honor.

MR. COLIN: May I continue to read this cross-examination, and may I do so without further interruption, please?

MR. ORSECK: I have a right to make any objection.

THE COURT: You do, and you have made your objection.

MR. COLIN: May I proceed now?

THE COURT: I don't see any point in proceeding. You are just getting into what is in --

MR. COLIN: There was a reading from this deposition by Mr. Orseck on behalf of the plaintiff. He read everything that he considered to be helpful to his side.

THE COURT: Why don't you read to the jury

from the exhibit. The exhibit is the best evidence. You are having the witness read from the exhibit.

MR. COLIN: I propose that the jury be given the exhibit, sir, but I would like to continue to read Mr. Spodaryk's testimony which, I think, is the simplest, clearest, and easiest way to understand the results. This is why he was examined.

THE COURT: But you get into things were you discuss it with him where he says no and three answers later he says yes, and I looked at page 29, and in another place you say, "Is that correct?" and he says, "No," and you argue as to what is correct. All you are talking about is what is in the exhibit.

I'm going to sustain the objection.

Do you want to read something here that goes beyond the exhibit? I will permit it. However, I am not going to go through a deposition having you take question and answer as to the contents of an exhibit that is in evidence. I would not do it if the witness was on the stand. I will not do it more so through a deposition. It is a poor use of our time.

I sustain the objection.

MR. COLIN: May I say that the same consideration that has been voiced would have applied in respect to

the plaintiff's use of this deposition.

THE COURT: I was not aware that that was happening; but to the extent it happened, I would have sustained your objection if you had made it.

MR. COLIN: I would not have considered it to be proper or fair, your Honor, to have made an objection.

MR. ORSECK: Your Honor --

THE COURT: Let's go ahead. If you have something from here that goes beyond the reading of the contents of an exhibit in evidence, I will permit you to do it.

MR. COLIN: Will you allow me to scan this deposition so I can see what I shall read?

THE COURT: Please do.

(Pause.)

MR. COLIN: Reading at page 34, line 1:

"Q And you've seen, sort of, an irridescent skin on the water, haven't you?

"A Yes.

"Q And that, to you, means the presence of oil, didn't it?

"A Yes.

"Q And on lakes and other bodies of water where you have seen this indication of oil present, did you notice that fish were living healthily in those

waters?

"A I assume so."

MR. COLIN: At page 43, line 11:

"Q Here in this report, referring to Kwak No. 2, you only put down that oil was present without stating the degree to which it was present, is that correct?

"A Yes.

"Q Now, the samples that were taken from the Doralee ponds and from the area of the Doralee ponds, were taken from waters where you saw some indication of oil on the surface, is that correct, sir?

"A Yes.

"Q And you notice, do you not, and you are able to say that the fish were living in those waters up to the time of the kill, is that correct?

"A Yes, I would have to assume they were there prior to the time of the kill.

"Q And the samples that you took out of these waters, and into which you put your test fish, had oil present, is that correct, sir?

"A Yes.

"Q And those fish came out alive and normal after your bioassay, isn't that correct, sir?

"A Yes."

MR. COLIN: Page 45, line 11:

"Q Did you perform a dissolved oxygen test on these samples?

"A Specifically, on the samples that were taken?

"Q Or on any other samples from these waters?

"A We did make one dissolved oxygen determination on April 20th.

"Q On April 20th. Is that something that you do in your lab, or do you do that right at the scene?

"A That was done at the scene.

"Q What is the purpose of a dissolved oxygen test?

"A To tell you how much oxygen is in the water.

"Q And what is the significance of the presence of oxygen in quantitative terms?

"A Just like you and I, with oxygen absence the fish would suffocate.

"Q So there is, I assume, a norm below which living is difficult for the fish and above which they are adequately supplied with oxygen, is that it?

"A Yes.

"Q Do you have your test before you now?

"A The test?

"Q Or the result of the test?

"A Yes.

"Q May I see it, please? -- now, how many parts per million of oxygen is minimally necessary to sustain fish life?

"A Well, the amount of oxygen to sustain fish life is dependent on a number of factors, the temperature of the water, the fish species themselves.

"Q Well, dealing with pan fish and pickerel, can you give me an answer?

"A Do you mean over a long period of time, or do you mean an acute problem over a short period of time?

"Q No, I mean generally, sir.

"A I think it would be, probably, ideally to have the oxygen in the water above a concentration of above, say, three or four parts per million anyway.

"Q Anything representing a higher degree of oxygen is even better for the fish, then?

"A Yes.

"Q Now, did you find the oxygen in your

sample to be 8.72 parts per million?

"A Yes, I believe that is the figure."

MR. COLIN: Now going to page 54, line 19:

"Q Have you had any reports of contamination or circumstances inimical to fish life since April 20, 1972?

"A No."

MR. COLIN: And the answer given by the witness was, the answer to the question last asked, whether he had any reports -- I will read it --

MR. ORSECK: You can paraphrase it.

MR. COLIN: -- whether he had any reports of contamination or circumstances inimical to fish life since April 20, 1972, and the answer in June of 1974 --

At this time I am going to say that each of the documents admitted in evidence in this case relative to putting a fish into a sample of the waters taken from the vicinity of Doralee pond, each test result as shown in the notes of the scientist that has been admitted in evidence in this case shows that in all --

MR. ORSECK: Wait a minute.

THE COURT: I sustain that. That's argumentative.

If you want to read what those tests are, I

sustain it.

MR. COLIN: I am trying to save time.

THE COURT: I will not permit it. I sustain the objection.

MR. COLIN: No. 6, test number, sample taken at the end of culvert at entrance to swamp area --

MR. ORSECK: I think we have to know what he is reading from, your Honor.

MR. COLIN: Exhibit 27.

THE COURT: Go ahead.

MR. COLIN: Termination, 11:30 a.m., April 27, 1972: Fish alive and normal. Duration 144 hours.

Test No. 5: Effluent from the upper Doralee pond.

MR. ORSECK: Excuse me. Mr. Colin has represented to the jury that he was going to read every test.

THE COURT: No.

MR. ORSECK: I want the jury to understand that he has not read every test.

MR. COLIN: Every test where a fish was put into waters drawn from the pond.

MR. ORSECK: Why don't you read the one you skipped?

MR. COLIN: I didn't skip any. Maybe your

sequence is different from mine.

MR. ORSECK: You are reading --

MR. COLIN: I am reading the result and how long the fish was in the water and where the sample came from.

MR. ORSECK: All right.

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: I would like to avoid the position where you read half of the test and then Mr. Orseck claims he has to read the other half and your half in addition to put the thing into context. I gather that this particular one you were just reading, the fish was put in distress but ended up healthy and you are reading the ending up. Is there some way we can save the jury's time in this matter?

Are you insisting that the entire one be read?

MR. ORSECK: As long as he puts in the initial status -- otherwise it has no probative value.

THE COURT: Mr. Colin, you may proceed the way you want to proceed, but, on the other hand, if you feel that certain materials have been left out you may read in the entire test.

You may wish, in view of that, to have a little discussion as to what you will read in its entirety.

MR. COLIN: There are five or six tests. It won't take long.

(In open court.)

MR. COLIN: I think I read the next one, which was the effluent from the upper Doralee pond: Duration, 144 hours; 11:30 a.m., April 27, 1972: fish alive and normal.

The next test, termination 2:28, April 27, 1972: fish alive and normal; duration, 144 hours.

Next test: termination 2:28 p.m., April 27, 1972: fish alive and normal; duration, 144 hours.

Next test from loading dock: termination 2:28 p.m., April 27, 1972: fish alive and normal; duration, 144 hours.

Fish in the fifth bioassay all okay, Saturday, a.m., 10:22; oil film visible on A and I-2.

Next test, effluent from culvert to swamp, termination 11:30 a.m., April 27, 1972: fish alive and normal; duration, 72 hours.

Next sample from the lower Doralee pond, east of the spillway, termination 11:30 a.m., April 27, 1972: fish alive and normal; duration, 72 hours.

That covers all of the reports prepared by the man who tested the fish.

MR. ORSECK: I move that that be stricken from

the record.

THE COURT: That comment is to be disregarded.

MR. COLIN: That's all I have from Spodaryk's deposition, your Honor.

THE COURT: Mr. Grubbs, do you have any portion that you wish to read?

MR. GRUBBS: No, your Honor. That's complete, your Honor.

THE COURT: Do you want to read any part to the jury? You may, Mr. Orseck.

MR. ORSECK: Mr. Colin read part of some of the tests.

THE COURT: Do you wish to read --

MR. COLIN: Your Honor, I read all of the tests.

THE COURT: Counsel, I want to avoid this.

MR. COLIN: Counsel made a remark and I request--

THE COURT: Ladies and gentlemen, you are to disregard these remarks. You are to decide this case on the evidence that you hear. I am directing the evidence now be put to you. You are to disregard the comments of any counsel.

Let's go. Read such portions as you wish.

#13 MR. ORSECK: I am reading from test No. 5, ladies and gentlemen: One blacknose -- I can't read what type of fish it is.

Comments: In immediate distress, five p.m.; in severe distress, 4:22. At 1:27, fish in distress; 4:07 p.m., fish same.

MR. COLIN: May I approach the bench, your Honor?

THE COURT: As long as he is reading accurately from the report --

MR. COLIN: We have a reversal of what should be the proper order of proof. Mr. Orseck read from this deposition, entered these exhibits. I then, by way of response, did what I did. Now Mr. Orseck is reading after I did, and the result is that he is reading the earlier part of the test, and it creates a reversal of emphasis, because the test ended with the fish alive and normal in each case.

THE COURT: We discussed this at the side bar. I thought I said we might proceed in that fashion, that you might discuss doing it jointly. When we left the side bar I assumed everybody was aware of how it would be done. I am surprised.

MR. COLIN: I was aware of your Honor's direction which I must accept, but the result is what I have said.

THE COURT: If you did not appreciate my direction at the side bar I wish you had discussed it with me at the time. I thought we had a perfectly clear discussion.

In any event, I will permit Mr. Orseck to continue. The jury may look at the entire exhibit.

MR. COLIN: After Mr. Orseck's reading may I read what follows?

MR. ORSECK: Read the whole thing.

THE COURT: I thought you had already done that. I had hoped to avoid this problem by suggesting at the side bar that the entire entry be read; but if that was not agreeable to counsel I suggested you might read what you wished and Mr. Orseck might read what he wished.

Having gotten to this impasse I will permit him to read.

MR. COLIN: May I read the terminal part of each?

THE COURT: You already have.

MR. COLIN: After he reads.

THE COURT: You have already done that.

Proceed.

MR. ORSECK: I am reading from the last box in the first page of 27:

One blacknose dayfish.

Comments: 2:45 p.m., in distress.

To save time, it is true, there is no question --

THE COURT: Please don't.

MR. ORSECK: Everyone ended with the fish all right. Nobody said they were not.

On the second page of the exhibit, in the third box, the same type of fish, 2:28 p.m., 2:29, in some distress; at 5:00 p.m., in severe distress.

On the third page, referring to sample J-2, comments: 1:00 o'clock p.m., 4/24/72, the fish apparently is in distress. Water has oily smell.

That's it, Judge.

THE COURT: Call your next witness.

MR. ORSECK: Dora Huss, please.

D O R A H U S S, called as a witness on behalf of the

xxx plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ORSECK:

Q I am about to hand you photographs marked for identification as Plaintiff's Exhibits 29 through and including 35.

THE COURT: Mr. Orseck, I assume Mrs. Huss is in some way connected with Doralee Estates. Would you establish that on the record.

MR. ORSECK: Surely, Judge.

THE COURT: You are connected with Doralee

Estates?

THE WITNESS: Yes.

THE COURT: What is your connection?

THE WITNESS: President.

THE COURT: How long have you been the president?

THE WITNESS: Since 1965.

THE COURT: Do you own any stock in the corporation?

THE WITNESS: Yes.

THE COURT: What is your stock ownership?

THE WITNESS: One hundred percent.

THE COURT: As president, do you operate it each summer?

THE WITNESS: Yes.

THE COURT: You may proceed.

MR. ORSECK: I'm sorry, your Honor.

In an attempt to save time, before interrogating the witness, I will show these exhibits to counsel and perhaps something may come from it.

THE COURT: Are you going to offer them in evidence?

MR. ORSECK: Yes.

THE COURT: Have counsel seen these before on

any occasion?

(Pause.)

THE COURT: Is there any objection?

MR. COLIN: I don't know what this represents but I don't think I have an objection.

THE COURT: I assume these are photographs of Doralee and environs taken at a certain time.

MR. ORSECK: Almost.

MR. COLIN: I will wait until they are covered. I don't think there is going to be an objection. I want to know what their purpose is.

BY MR. ORSECK:

Q Do all of these exhibits show or depict a fair representation of the Cities Service plant across from your bungalow colony during the summer of 1973?

MR. COLIN: Fix a time, please.

THE COURT: 1973.

Q Can you give us your best estimate, if you can?

A Yes.

Q About when?

A I would say any time between April and June.

THE COURT: Of 1973?

THE WITNESS: Yes.

THE COURT: Proceed.

MR. ORSECK: I offer these in evidence.

THE COURT: Is there any objection?

MR. COLIN: I have none.

MR. GRUBBS: If your Honor please, as long as it is clear that the photograph was taken after my client vacated the premises, I have no objection.

THE COURT: I do not think that is part of the offer. All that is being offered is that these are photographs between April and June of 1973.

MR. GRUBBS: No objection.

THE COURT: They will be received.

(Plaintiff's Exhibits 29 through 35 received in evidence.)

BY MR. ORSECK:

Q Mrs. Huss, these are pictures of the Cities Service plant being dismantled, as best as you can remember, in May or June of 1973?

MR. COLIN: I object to that.

THE COURT: That's the plant we have been talking about?

THE WITNESS: Yes.

THE COURT: Sometime April to June of 1973?

THE WITNESS: Yes.

THE COURT: You cannot come any closer than that

THE WITNESS: It may have been after June. I determine this by the foliage on the trees and generally things begin to bloom rather late up there. In the city it would start like in April. Up there sometimes there are trees that are not in bloom until well into May and June.

MR. ORSECK: Your Honor, only for continuity may I read portions now of Exhibits 10 and 12 in evidence. They are bills in evidence from the contractors, Cities Service, for the work which is shown in those pictures, and it can clarify to the jury the time of the work.

THE COURT: Let me see that.

(Pause.)

MR. ORSECK: Your Honor, even though it will consume five minutes I'd like to show these to the jury at this time.

THE COURT: You may.

(Plaintiff's Exhibits 29 through 35 shown to the jury.)

THE COURT: Why don't we take a break for ten minutes? Show those to counsel and we may save ourselves quite a bit of time.

We will take our midmorning recess, ladies and gentlemen. Those of you looking at these may continue to do so for a minute.

(Recess.)

(Jury in box.)

MR. ORSECK: These are not consented to, your Honor.

BY MR. ORSECK:

Q I show you Exhibit 36 marked for identification and I ask you if you recognize the photograph.

A Yes, sir.

Q Tell us generally what it purports to show at what time, if you can.

MR. COLIN: Objection.

THE COURT: What is the basis of your objection?

MR. COLIN: There is no foundation laid to show that this witness is the photographer, and observed the conditions at the time the photograph was taken, and I think if anything in particular is depicted on the photo that would have to be established as a prerequisite of its authentication.

THE COURT: You want the cart before the horse and then you are going to say the horse is not before the cart.

The lady doesn't need to be the photographer. All she has to be able to say is that this is a fair and accurate representation of a particular situation.

MR. COLIN: May I see the photo? May I direct it to your Honor's attention and you will understand my position.

(Pause.)

THE COURT: You may proceed.

BY MR. ORSECK:

Q Do you recognize what is depicted on Exhibit 36 for identification?

A Yes, sir.

Q Can you tell us the time that it depicted, whatever you say you recognize it is?

MR. COLIN: Objected to.

THE COURT: Overruled.

A The beginning of December, 1976.

Q Did you see the scene that that document depicts in early December of 1976?

A Yes.

MR. COLIN: Your Honor, I move to strike.

THE COURT: No. Overruled.

MR. COLIN: I think the time established as such renders the document inadmissible.

THE COURT: Overruled.

Were you there when that picture was taken?

THE WITNESS: Yes.

THE COURT: Did you take the picture?

THE WITNESS: No, sir.

THE COURT: You were standing there while it was being taken?

THE WITNESS: Yes.

THE COURT: You saw the scene that is represented in this picture?

THE WITNESS: Yes.

THE COURT: It is a fair and accurate representation of what you saw on that day and at that time?

THE WITNESS: Yes.

MR. ORSECK: It is offered.

MR. COLIN: May I examine as to this?

THE COURT: You may.

Where is this in connection with these waters we have been talking about?

THE WITNESS: This represents a portion of the upper lake, the larger lake. The retaining wall is evident and the shore line is evident.

THE COURT: This is where the water flows out of the upper lake?

THE WITNESS: No.

THE COURT: It appears to be flowing by some abutment there?

THE WITNESS: That's part of the retaining wall.

VOIR DIRE EXAMINATION

BY MR. COLIN:

Q What is supposed to be in the foreground of this picture, Mrs. Huss?

A It shows the shore line and the retaining wall and the water in the lake.

Q And the shore line is at the lower portion of the picture facing the holder of it, and the retaining wall is on the left?

A The shore line is the upper portion. The retaining wall is to the right.

Q Was this picture taken from a point in the water of the lake?

A No.

Q Where was it taken from?

A From the shore.

Q You are quite positive that on the right side of the picture is the retaining wall and that the upper part of the picture is the shore line?

A Yes.

MR. ORSECK: I have no objection to all the questions on the wall, but this is not voir dire.

MR. COLIN: The picture to me is not intelligible

That's what I'm trying to convey.

THE COURT: Overruled.

Mr. Grubbs, do you have any objection?

MR. GRUBBS: No.

THE COURT: It will be received.

(Plaintiff's Exhibit 36 received in evidence.)

MR. ORSECK: This is the only photograph, your Honor, which I ask be separately shown to the jury because all the rest are on another date.

THE COURT: All right.

(Plaintiff's Exhibit 36 in evidence shown to the jury.)

BY MR. ORSECK:

Q I have just handed you color photographs marked Plaintiff's Exhibits 37 through and including 42. Were those photographs taken in your presence?

A Yes.

Q When were they taken?

A In the fall of 1976.

Q Does each of them show a portion of your premises?

A I'm not positive about this one (indicating).

Q You are referring to No. 40?

A Yes, sir.

Q With respect to Exhibits 37 through 42 for identification, do they now look like, as photographs, what you saw on your premises when the pictures were taken? In other words, are they fair representations of what you saw at the time?

A Yes, sir.

MR. ORSECK: These have been shown to counsel during the recess and they are offered in evidence.

MR. COLIN: Objected to because the date is not relevant to the issues of this case, your Honor.

MR. GRUBBS: I join in the objection.

THE COURT: Come to the side bar and let me see the pictures.

(At the side bar.)

THE COURT: Mr. Orseck, what is the purpose of this offer?

MR. ORSECK: The next question would be --

THE COURT: This is the oil on the water. I will overrule the objection to that. This is 42.

MR. COLIN: Your Honor, you said that's oil on the water. There is no proof of what it is.

THE COURT: If you use your eyes you can see there is an oil slick on the water.

MR. COLIN: How about a sewerage slick?

THE COURT: We have heard testimony of an oil slick on the water.

MR. ORSECK: You brought it out from Edison. He said he saw that.

MR. COLIN: He volunteered it.

THE COURT: You asked him what if anything accounted for the difference in rental values.

In any event, it was brought out during your cross-examination.

MR. ORSECK: This is to show what the premises looked like.

THE COURT: The reason I asked that: It seems to me that the oil pictures are admissible to show the condition as you allege it still exists. But before -- it seems to me there has to be a little showing here and it may be easily done, I suppose, that it looks the same as it did in 1972. If you establish that fact I will then admit these.

What are these pictures of foliage about?

MR. ORSECK: I will withdraw those.

THE COURT: One doesn't seem to learn an awful lot from these pictures.

MR. GRUBBS: If your Honor please, my reason for joining in the objection is there is no foundation as

the source of whatever these pictures depict.

MR. ORSECK: That's for the jury, your Honor.

THE COURT: I think there is in the record that the jury could find a foundation for the source which is sufficient to overrule that objection.

Do you have any problem with this?

MR. ORSECK: These are offered only to show the general condition.

MR. COLIN: I join in that last objection.

THE COURT: Is there any problem with that?

MR. GRUBBS: No.

THE COURT: Mr. Colin? Do you have any problem with Exhibits 37 and 38 as being a view as to how the premises existed then and now?

MR. COLIN: I think with one or two questions it could be related to the proper period.

THE COURT: Put them to her.

(In open court.)

MR. ORSECK: May the record indicate that Exhibits 39 and 41 for identification are withdrawn.

THE COURT: Exhibit 42 is admitted.

xxx (Plaintiff's Exhibit 42 received in evidence.)

BY MR. ORSECK:

Q Mrs. Huss, with respect to Exhibits 37 and 38

for identification, you have told us that they represent what you saw this past fall?

A Yes, sir.

Q Would they also be a fair representation of the premises in each of the preceding falls for the last four or five or six or seven years?

A Yes, sir.

Q In other words, the premises has not changed in any material respect over that period of time?

A No, sir.

THE COURT: They are received in evidence.

(Plaintiff's Exhibits 37 and 38 received in

xxx evidence.)

Q With respect to Exhibit 40, when I handed all the exhibits to you, you said that that one did not constitute part of your premises?

A That is correct.

Q Were you present when that picture was taken?

A Yes.

Q Was that at the same time?

A Yes.

Q What does it show?

MR. COLIN: I object to that.

THE COURT: Overruled.

A It shows a pipe feeding the swamp or preserve area.

Q Could you be more specific?

A Well, it is directed from the Cities Service property to the beginning of my --

THE COURT: I will strike out the answer as being a conclusion.

This is the pipe that flows under the road?

THE WITNESS: To my side of the road, yes.

THE COURT: Where is the other end of that pipe?

THE WITNESS: At the Cities Service location.

THE COURT: Without characterizing it as "the Cities Service location," is that the oil distribution area across the way or, when it was taken, where the oil distribution area was not?

THE WITNESS: That's right.

Q Has that been there for the last ten years, as far as you know?

A Yes.

MR. COLIN: Meaning the pipe?

MR. ORSECK: That's correct.

THE COURT: Is there any objection to that?

MR. COLIN: No objection.

THE COURT: It will be received.

xxx (Plaintiff's Exhibit 40 received in evidence.)

MR. ORSECK: These are offered to show only the condition of the premises in general.

THE COURT: What time were those taken?

MR. ORSECK: April of 1972.

THE COURT: When you finish looking at them, Mr. Colin, pass them to the foreman.

(Pause.)

MR. ORSECK: They are random snapshots of the premises.

(Pause.)

THE COURT: Is there any objection?

MR. COLIN: None.

MR. GRUBBS: None.

THE COURT: They may be received.

xxx (Plaintiff's Exhibits 43 through 59 received in evidence.)

BY MR. ORSECK:

Q Exhibits 43 through 59, the little photographs I have in my hand, they were taken when?

A In 1972, April.

Q Do you know who took them?

A I believe I took some and the attorney on the

attorney on the last action --

Q What is his name?

A Ted Drew.

Q Were you present when they were all taken?

A Yes.

Q Are they random --

THE COURT: They are in evidence.

MR. ORSECK: I wanted one question.

THE COURT: Proceed.

Q They are random snapshots of different portions of the premises?

A Yes.

MR. ORSECK: May I pass these to the jury, your Honor?

THE COURT: Yes.

(The aforesaid exhibits were passed to the jury.)

MR. ORSECK: May I ask a question while the jury is looking?

BY MR. ORSECK:

Q Do the premises look the same, different, or anything in between today as shown in these last twenty pictures?

A A little different.

Q How about in substance?

A Well, we have added wooden patios to the buildings. They have been repainted. New roads.

THE COURT: New surface on the roads, you mean?

THE WITNESS: Yes. "New surface" would be more accurate.

MR. ORSECK: May the record indicate that I am giving five more. Do I have to enumerate them?

THE COURT: If they are marked already, no.

(Pause.)

BY MR. ORSECK:

Q Mrs. Huss, back in 1967 or 1968, whenever it was, did you bring an action in the Supreme Court in the State of New York against Cities Service Oil?

A Yes.

Q In that case also Monticello Gas & Oil?

A Yes.

Q Do you recall towards the end of April of 1972 an action came on for trial up in the Supreme Court of Sullivan County?

A Yes.

Q Were you present on April 25 when, on the record, in a courtroom not too much unlike this, a settlement agreement was arrived at?

A Yes.

Q I show you Exhibit 60 for identification, and ask if that is a true and accurate copy of the agreement.

THE COURT: Do you propose to offer that? Show it to the other side.

MR. ORSECK: It is part of the pleadings.

THE COURT: There may be no problem with it.

(Pause.)

MR. COLIN: No objection.

MR. GRUBBS: No objection.

THE COURT: It will be received.

(Plaintiff's Exhibit 60 received in evidence.)

(Mr. Orseck read to the jury from Plaintiff's Exhibit 60 in evidence.)

MR. ORSECK: At a later juncture I will read more from this exhibit, your Honor.

BY MR. ORSECK:

Q What I just read to the jury, that was the settlement agreement, was it not?

A Yes.

Q That was made in the presence of the Court?

A Yes.

Q In the presence of all the parties?

A Yes.

Q I show you 61 for identification. Do you remember reading that document?

A Yes.

Q Did you sign it?

A Yes.

Q Was that prepared at your own lawyer's office after the court proceedings were over that day?

A Yes.

Q And only present were you and your lawyer and a notary public?

A Yes.

MR. ORSECK: I offer Exhibit 61 for identification into evidence.

MR. COLIN: I have no objection to this except it is, of course, on its face, a copy of an original document which was delivered.

MR. ORSECK: You have the original.

MR. COLIN: With that understanding --

THE COURT: Mr. Grubbs?

MR. GRUBBS: No.

THE COURT: It will be received.

xxx (Plaintiff's Exhibit 61 received in evidence.)

MR. ORSECK: May I read portions of this?

THE COURT: Yes.

(Mr. Orseck read to the jury from plaintiff's Exhibit 61 in evidence.)

MR. ORSECK: May we approach the side bar?

THE COURT: Yes.

(At the side bar.)

MR. ORSECK: Your Honor, it is the plaintiff's position that it is for the Court to rule as a matter of law that the stipulation of settlement governs in this case; that the release was not required to be executed. It is mere surplusage and on the very face of it --

THE COURT: It seems to me that it is a jury question based upon her testimony here as to whether she intended to put in April or October, and they will have to make a determination as to whether she made the mistake or not.

What is your view about that?

MR. COLIN: A unilateral mistake, your Honor, is not the basis to set aside or reform a document.

THE COURT: If there is no consideration for the additional period of the release -- I am not taking the position -- I am not purporting to have made an analysis of this as a contract matter, but it seems to me if someone has made a settlement in court for April 24, 1972, and they go home and type up October 24, 1972 in a release they

promised to deliver, there has to be a basis under which they are relieved of that typographical error. Obviously there has been no consideration given for the additional time that is given by that release. It may be that it fails of extra time because of the failure of consideration. It would appear from reading that release that it intends to track the language of the settlement in court.

MR. ORSECK: One further argument: The stipulation of settlement itself is a release and doesn't call for the production of the general release, and the general release therefore has no significance. There can be no showing of consummation of this predicated upon the condition that a further document be delivered and, therefore, the general release --

THE COURT: I know, but, nevertheless, your client did deliver the instrument and the instrument contains error. I think that that question becomes a jury question here as to whether that was an error or not.

MR. COLIN: I don't think there is anything to show that this was an error. In fact, proof is to the contrary. Proof from this witness is that her lawyer drew it. She signed it.

THE COURT: How many secretaries have put in the wrong month in an instrument and you or I did not catch

it? We will hear testimony on that. I will permit her to give testimony if counsel is so minded.

MR. GRUBBS: If your Honor please, the observation I wanted to make, I feel that in this action I don't see any application for relief in this regard, the action presently pending.

THE COURT: It makes a difference as to whether the conduct of the defendants here, whether it is governed by other principles, but it makes a difference here whether the conduct of the defendants is such that it casts liability upon them for oil spills between April 24th and October 24th. That's perfectly clear.

MR. GRUBBS: I didn't state my position clearly.

If he is endeavoring to achieve a reformation, I don't think that any reformation or rescission has been petitioned in this suit. I think there is nothing in the suit in which this particular relief has been requested.

MR. COLIN: That's correct.

MR. ORSECK: It has been. Why don't you look at the eighth cause of action. Did you look at the pleadings?

THE COURT: I am sure that Mr. Orseck was doing what any counsel would do. He is aware you are going to come back with this instrument and say, "Ha ha, the

1 situation is different than it is in the stipulation," and
2 he is, in effect, meeting what he knows you are going to
3 do here and what you fully planned to do.
4 MR. ORSECK: They claimed release so I have
5 a right to explain it.
6 THE COURT: You may go forward with those
7 general principles in mind.
8 (In open court.)
9 THE COURT: I will reserve decision.
10 You may go ahead. I will reserve decision
11 on that one question you put to me about treating certain
12 aspects as a matter of law.
13 BY MR. ORSECK:
14 Q Mrs. Huss, Exhibit 60, which is a stipulation
15 of settlement made in open court in the presence of every-
16 body, all counsel and the judge, states, as I read to the
17 jury, that you intended at that time subject to other con-
18 ditions which we will get to later, to release the defendants
19 for nuisance and negligence up to April 25, 1972.
20 MR. COLIN: Objection, your Honor.
21 A Yes.
22 THE COURT: Overruled.
23 That's the instrument that was executed in
24 court when all were present. It reflects that.
25

MR. COLIN: The instrument speaks for itself. The question was leading.

THE COURT: Overruled.

Q When the stipulation of settlement was put on the record, did Judge Pitt ask you, "Do you understand it? Do you agree to it?"

A Yes.

Q At the time, what was your understanding --

THE COURT: I will sustain an objection to that. It is in there. It is written in there.

Q In the document, 61, which was prepared in your lawyer's office at which time only you, the lawyer, and and a notary public were present, the document talks about the date being October 24, 1972. Do you see that?

A Yes.

Q As far as you know, the defendants never requested 61, did they?

A No.

MR. COLIN: Objected to, your Honor.

THE COURT: Overruled.

A No.

MR. ORSECK: That's all with respect to these documents, your Honor.

THE COURT: I think we will take our luncheon

pgem

break at this time.

I will give you until ten minutes after two. We will take our luncheon break until ten minutes after two.

(Jury excused.)

THE COURT: Why was October put in there?

MR. ORSECK: It is a mistake.

THE COURT: Why don't you ask the witness that question?

MR. ORSECK: I will after the recess.

THE COURT: She signed it believing it to be --

MR. ORSECK: Yes, the other date.

THE COURT: Local counsel for Monticello, do you have some point you wish to make at this point?

#14 MR. BAUM: I would like to make it in chambers, your Honor. Counsel for the opposition is present. I would like to make it absent counsel for the opposition.

MR. ORSECK: If it would assist your Honor I would object to that.

THE COURT: I am not sure I can do that.

MR. BAUM: I don't believe it has anything to do with the plaintiff nor should the plaintiff be aware of the contents.

THE COURT: You are trying to inform me as to certain matters that touch upon and affect this case,

and you are proposing to do that in the absence of the other party?

MR. BAUM: May I make an offer of proof in the absence of the other party, and if the Court thinks the other party --

THE COURT: Come up here to the side bar and I will talk to you off the record for a second to see what it is that you have in mind.

Off the record.

(A discussion off the record was had at the side bar.)

(In the robing room; Mr. Orseck was not present.)

THE COURT: Off the record.

(Discussion off the record.)

MR. BAUM: Your Honor, I represent Monticello Gas & Oil and MGO Corp. by reason of the Firemen's Insurance Company policy L440879, or such other liability insurance policies which may be in effect.

By my letter of December 29, 1975, MGO was notified by W. J. Wright, supervising adjuster of Underwriters Adjusting Company, that there would be no coverage for any sums recovered by the plaintiff attributable as punitive damages. By the same letter they also advised MGO

if they chose to retain independent counsel, to take whatever steps were necessary to protect their rights.

In that regard I was the independent counsel retained.

I have been in touch with Mr. Grubbs who is the trial counsel representing MGO Corporation and Monticello Gas & Oil Company, Inc. with regard to the trial of the action. I have come here today to participate or observe the trial.

During the course of the trial, or preceding the trial, the plaintiff, as I understand it, made a demand of $60,000, which would be accepted in full settlement. This demand was considered by Mr. Grubbs, as counsel for the third party defendants, and also in his capacity as counsel representing the insurance carrier.

MR. GRUBBS: No, no. Let's get the record straight. In this suit I represent you and not the insurance company, and that's why I think you really should contact the insurance company as to what you are saying.

Go ahead.

I want the record clear that I represent you. We represent a mutual client.

MR. BAUM: It was the carrier that selected the trial counsel to provide the defense under the terms

of the policy.

Mr. Colin, trial counsel for Cities Service, also participated in receiving the demand of $60,000 for settlement in full.

Discussion was had amongst Mr. Colin, Mr. Grubbs, and myself regarding the feasibility of this demand, and, as I understand it, they both, by telephone, contacted their respective clients, Mr. Colin in his case Cities Service, Mr. Grubbs, the mutual client, if you will, Firemen's.

As a result of that contact both Mr. Colin and Mr. Grubbs rejected the demand of $60,000 and came up with a counter-proposal whereby Cities Service would pay the sum of $12,500 and MGO Corp. and Monticello Gas & Oil Co., Inc. would pay the sum of $12,500. The sum of $12,500 to be paid by Monticello Gas & Oil and MGO Corp. remains to be determined as there is a possibility that some of the damages that may be recovered in the action may not be covered by the policy.

It is my position that the proof elicited so far through two supposed experts produced by the plaintiff, one a man by the name of Edison involving a possible loss of rental by the plaintiff in the amount of $28,000 subject to arithmetical calculation, and the other testimony by a

so-called engineer or bulldozer operator by the name of Rosch, who testified, in essence, it would cost $21,000 to clean up a pond which was allegedly polluted by petroleum substances coming from the property which is involved in the lawsuit.

On this basis the damages shown so far, which have not been contradicted because the trial tactics of Mr. Grubbs and Mr. Colin have not been to bring in contradictory proof but to rely upon the initial inadmissibility of the testimony produced by Mr. Edison and Mr. Rosch, and, secondarily, that if that testimony is properly admissible that it is not competent, does not prove the damages with reasonable certainty so that the plaintiff would not sustain its burden of proof with regard to showing its special and out-of-pocket damages.

However, since that proof is not contradicted, it is my position that a minimum of recovery here is $49,000 at this point, and that the failure of Mr. Colin and Mr. Grubbs representing their mutual clients to come up with a counter-proposal of at least $49,000 the uncontradicted damages now in evidence and produced by the plaintiff, constitutes in my judgment a failure to bargain in good faith, and because of that failure to bargain in good faith there is a possibility that MGO Corp. and Monticello

1 pgem

2 Gas & Oil Co. Inc. may be exposed to a verdict far in excess
3 of $49,000 and may, because of the possibility that the
4 underlying liability policy does not cover all of the time
5 frame which is within this lawsuit, because they did pay
6 an excessive amount over and above the $49,000; that if
7 there was good-faith bargaining by Mr. Grubbs and Mr. Colin
8 on behalf of their respective clients this exposure would
9 not affect MGO Corp. and Monticello Gas & Oil Company.
10 In addition, with regard to Cities Service,
11 the claimover being based upon an indemnification agreement
12 places upon them a similar duty to bargain in good faith
13 and to mitigate damages, and failure to bargain in good
14 faith and mitigate damages would have a direct effect on
15 the amount which they may claim over by virtue of the
16 indemnification agreement in favor of them and against MGO
17 Corp. and Monticello Gas & Oil Company.
18 With that in mind, I believe there is a duty
19 served upon Cities Service Oil Company to absolutely bargain
20 in good faith so as to minimize the amount of damages which
21 may eventually be claimed over against MGO Corp. and Monti-
22 cello Gas & Oil Company by virtue of that indemnification.
23 In view of the uncontradicted $49,000 damages
24 proven by the plaintiff at this time, the offer of $12,500
25 by Cities Service Oil Company as a settlement figure is

inadequate and not in good faith and exposes MGO Corp. and Monticello Gas & Oil Company to a verdict which could be substantially greater than what is presently before the Court.

MR. COLIN: May I say for the record that Cities Service Oil Company gave notice to MGO on the initiation of this action and directed its attention to the contractual provision for indemnification, and asked MGO to defend this action which was not complied with by MGO.

MR. GRUBBS: May it please your Honor, I think the record should be clear on a number of points that have not yet been brought out.

Initially, when notice was given to the client, the client, our mutual client, was invited to have a personal counsel associate himself with me, and they, in turn, did, and Mr. Baum who just spoke is that attorney, and we have on a number of occasions discussed it and our work has been very cooperative and helpful.

In so far as the negotiations stage of this particular case is concerned, as soon as plaintiff counsel gave me the $60,000 figure two days ago, as I told the Court I would do, I called both Mr. Baum and the insurance carrier, and it is true that both reactions were the same. Mr. Baum expressed the exorbitancy of it and stated that at

pgem

such a figure the plaintiff could only hope to get such an amount from a jury; and, similarly, the insurance people felt the same way.

The fact that any plaintiffs put s on anyone who operates a machine and states he would charge such and such an amount to do some work that was never done, and then that is followed by a real estate man who has talked to several other bungalow owners, according to his testimony, and they said to him that the increase in their rate was such and such, in my mind no litigant is required to accept partisan testimony of that nature, particularly in view of the way it was given at the trial. I feel that so far as the defendants are negotiating, the defendants are negotiating in good faith, and I think that the facts on the prior settlement confirm that.

There was a seven-year period in which the plaintiff herself accepted $12,500 for the total period of seven years. Here we are dealing with a period much shorter and a period during which the installation has been not only taken out of operation but the soil has been moved and replaced.

On the impartial facts I don't think that it is fair to say that anybody is operating not in good faith; however, I think it should be made clear on the record that

when I received the authorization to make an offer in this case, and I communicated that to Cities Service, I made it clear to Cities Service's counsel that that was not made ona 50-50 basis. This was made on the basis of our position compared to their position.

I respectfully submit that the only cause of action against my clients in this suit is a case of contractual indemnity based on a lease of real estate in this state and I respectfully submit that the leading authorities have uniformly recognized, as did the legislature, that such a provision in a lease is not only null and void but wholly unenforceable for any purpose.

THE COURT: Gentlemen, we shall take our luncheon recess.

(Luncheon recess.)

- - -

(In the robing room.)

THE COURT: The jury is coming in, gentlemen. I want to be quick.

Considering over the recess this exhibit, 61, which is the release, Mr. Colin, do you contend that that October date was put in there other than by mistake?

MR. COLIN: I contend on the proof that was adduced today, your Honor, and as one who was not involved in the prior proceedings, that the release was prepared by counsel for the plaintiff and signed by her and transmitted--

THE COURT: That's not what I asked you.

The plaintiff contends that the wrong month is in there. In the courtroom they had stipulated to April 24, 1972, and that that afternoon a lawyer in getting up a formal release types in October by error.

MR. COLIN: The way I analyze the date, your Honor, there was a period of time until October or so to submit plans. That date, October 24, is consonant with the time allowed to submit plans and do certain work or give up the premises.

I think that that date was wittingly supplied. It is a relevant, coherent date in relation to what the parties were talking about.

THE COURT: I don't remember the exact --

MR. COLIN: There was a stipulation about time to file --

THE COURT: Is there any way you can tie that date, six months later, any six months' date in that stipulation?

MR. ORSECK: Yes, there is. But that interpretation is another argument which would be preposterous.

THE COURT: I will not argue about this. It seems to me that viewing this as reasonably as I can, a lawyer or secretary made a mistake and nobody caught it. If that is so, then there is no consideration for releasing you from claims beyond April 24th; you gave nothing further by way of money. You don't make any claim of that, do you?

MR. COLIN: The date is not from left field. The date is a date that is incorporated in the stipulation.

THE COURT: I understand. There is no consideration--

MR. COLIN: The consideration question I do not think enters into it.

THE COURT: Mr. Colin, please. I don't want to dispute this with you. I want to ascertain what the proof problems are.

Given what you say I thought perhaps I could get a stipulation, that this was a clerical error, because that's

what it seems to me and the plaintiff is entitled to contend it is. I will permit the plaintiff's counsel to inquire of her as to whether that's a clerical error, as to whether it was intended to her that the date should read April. I will give that to the jury that this is a question that they are to decide. I will submit that as an additional issue.

I will see you outside.

(In open court; jury in box.)

D O R A H U S S, resumed.

DIRECT EXAMINATION

BY MR. ORSECK (Cont'd):

Q Prior to the recess we discussed Exhibits 60 and 61, the stipulation and the document which we call the release; is that correct?

A Yes.

Q Do you have them before you?

A Yes.

Q The stipulation made in court in general includes a release to Cities Service of claims you had up to April 25, 1972?

A That's right.

Q At the bottom of that document there is inquiry by the Court, by Judge Pitt, isn't there? Or if not by the

judge by the lawyers; isn't that so?

A Yes.

Q At that time your Mr. McDermott was Mr. Colin's counterpart; is that right?

A Yes.

THE COURT: He was the attorney for Cities Service?

MR. ORSECK: Yes.

May I read what Mr. McDermott said on the record?

THE COURT: Yes.

(Mr.Orseck read to the jury from Plaintiff's Exhibit 60 in evidence.)

Q Do you remember that answer?

A Yes.

Q Do you also remember Judge Pitts saying to you --

MR. COLIN: May I suggest it be read from the document, your Honor?

THE COURT: He is about to do that.

(Mr. Orseck read to the jury from Plaintiff's Exhibit 60 in evidence.)

Q Do you remember that?

A Yes.

Q Did that take place?

A Yes.

Q When you signed Exhibit 61 nobody asked you to change the date of the release from April to October, did they?

A No.

MR. COLIN: I object to that.

THE COURT: I will sustain it in that form.

Q Would you explain the fact that this stipulation which everybody agreed to has the date of April 25, that is the cutoff date, and the release that you signed has October 25?

THE COURT: How come October is in there?

MR. COLIN: May I note my objection.

THE COURT: Overruled.

A Judge Pitt suggested that it would take a little time.

Q Do you understand the question the judge asked you?

A Yes.

Q What is the question the judge asked you?

MR. COLIN: I object to that question.

THE COURT: My question was: How come October 25 is in the release, Exhibit 61?

Q How come --

MR. COLIN: I object to what is happening now. Your questions are apparently being interpreted by counsel.

THE COURT: I think it is clear. I believe it is clear.

MR. COLIN: I thought your question was clear.

THE COURT: You may answer it.

THE WITNESS: The date of hearing on No. 61 very evidently is in error since the --

MR. COLIN: I move to strike the response.

THE COURT: Deried.

Proceed.

THE WITNESS: (Cont'g) Reference is made to the stipulation dated April 25. There is a date here of April 24, too, somewhere -- terminating on the 24th day of October, 1972. I believe that's the correct date.

The reference here is made to the stipulation which was executed in court, and this is an error on the part of the typist, I would assume.

MR. COLIN: I move to strike the remainder of the answer.

THE COURT: Denied.

Q I show you Plaintiff's Exhibit 62 for identification. Would you please hold it while I ask the next

question.

Who is Leo Ingber?

A He has been doing some maintenance work and some managerial work at the Doralee Estates from time to time.

Q On behalf of Doralee Estates did Mr. Ingber enter into an agreement with the State of New York Conservation Fish & Wildlife Department in March of 1967?

A Yes.

MR. COLIN: I object to the form of the question.

THE COURT: What is the matter with the form?

MR. COLIN: Leading, and it calls for a conclusion as to whether agreement was made, which is a legal conclusion, and it relates to a period which is not relevant to this action.

MR. ORSECK: Your Honor, relevance to a further date will be demonstrated.

THE COURT: Just a moment.

(Pause.)

MR. ORSECK: I believe there was inquiry about this document in the deposition, too.

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: Are you aware of this? What is the purpose of this area of proof?

MR. ORSECK: It permitted the plaintiff in 1967 -- the State of New York entered into an agreement with Doralee whereby it stocked the lake with fish. We will show that subsequent to 1972 a new agreement for further stocking was sought and it was rejected because of the oil pollution.

MR. COLIN: I don't see how this proves the other.

MR. ORSECK: We wanted to show that it was available, the stocking.

THE COURT: How does that affect your damage question at all? You won't get any money for doing this.

MR. ORSECK: It tends to show the condition of the water?

THE COURT: You have shown that through a lot of other ways. I sustain the objection to this area.

(In open court.)

BY MR. ORSECK:

Q Mrs. Huss, is it a fact that on September 20, 1972 and October 6, 1972, you wrote letters to the Department of Environmental Conservation in which letters you complained about oil pollution, and also some sewer runoff

into your lakes?

A Yes.

Q Are Exhibits 63 and 64 the letters just referred to?

A Yes.

MR. ORSECK: I offer them in evidence.

MR. COLIN: May I see them, please?

(Pause.)

MR. ORSECK: You will concede you and I obtained those from Mr. Kwak's file?

MR. COLIN: I have no objection.

(Plaintiff's Exhibits 63 and 64 received in evidence.)

xxx

Q The Department of Environmental Conservation, did they answer that letter?

A Yes, sir.

Q Is that what the next document is?

A Yes.

Q What number is that?

A 65.

MR. ORSECK: We offer that in evidence, your Honor.

MR. COLIN: No objection.

xxx (Plaintiff's Exhibit 65 received in evidence.)

Q Is it true that on January 10, 1972, you entered into a written agreement, the original of which was filed in the Sullivan County Clerk's Office between you and the Village of Monticello, whereby a sewer --

MR.COLIN: I object to the characterization of a document not in evidence, and the best evidence of which would be the document.

(Pause.)

MR. ORSECK: Might I advise the Court the documents have been referred to in the last exhibit received on consent.

THE COURT: I don't think that is the problem. Do you have an objection to this?

(Pause.)

MR. COLIN: I do have an objection to this.

THE COURT: What is that?

MR. COLIN: My objection is that this is a grant of a right of way for a particular purpose and the grant of that right of way is in no way relevant or germane to anything with which that case is involved.

THE COURT: This is going to be tied up by the plaintiff to some sewerage disposal from this area?

MR. ORSECK: Of course.

MR. COLIN: That's not so.

MR. ORSECK: That's not so?

MR. COLIN: May we approach the bench, your Honor?

THE COURT: All right.

(At the side bar.)

THE COURT: Mr. Orseck, do you contend that these are properties along this lake hooked into this system?

MR. ORSECK: Some of them and the others were cured and there may be an issue of this.

THE COURT: Is somebody going to testify?

MR. ORSECK: Yes.

THE COURT: I will allow this exhibit.

MR. GRUBBS: Is it the testimony that her bungalows are tied into this?

MR. ORSECK: Hers and others.

THE COURT: It seems to me this is a foundation to show there was a sewerage system set up and she was tied into it, and the claim is that the damage is because of sewerage disposal.

MR. GRUBBS: I was under the impression the right of way was made a long time ago.

MR. ORSECK: Look at the date.

MR. GRUBBS: What is the date?

MR. ORSECK: It was not finished until 1973.

THE COURT: The objection is overruled. I regard it as relevant.

MR. GRUBBS: May I join in the objection?

THE COURT: Yes.

(In open court.)

xx (Plaintiff's Exhibit 65 received in evidence.)

THE COURT: Does that bear your signature?

THE WITNESS: Yes.

BY MR. ORSECK:

Q During 1972 and part of 1973, did the Village of Monticello do any construction through or on your property?

A Yes.

MR. COLIN: I object to it. Counsel has been leading almost continuously in this trial.

THE COURT: Overruled.

Q What did they do? What kind of construction did they do?

A They put in a trunk line through 1700 feet of my property beginning on Cold Spring Road through Waverly Avenue.

Q Mrs. Huss, the jury doesn't know what a trunk line is.

A To pick up any sewerage accommodated by this trunk line into the main sewerage disposal plant.

Q At first did the Village permit you to hook into that line?

A Yes.

Q My question was: Did they immediately let you or only after the letters that were marked in evidence?

A Afterwards.

MR. GRUBBS: Could we have a date set when the hookup was made?

THE COURT: Can we do that by reference to thos letters?

MR. ORSECK: The letters are her letters of complaint.

THE COURT: Can we fix that so that the jury has some frame of reference as to when that occurred according to her testimony. That's what your objection is?

MR. GRUBBS: Yes.

MR. ORSECK: The agreement she signed --

THE COURT: She said the hookup came after the letters.

MR. ORSECK: The last letter was November of 1972.

MR. GRUBBS: Objection. Are you going to set a time when the hookup was made? Was it a month or a year later?

THE COURT: You may cross-examine.

MR. GRUBBS: I want to know when the hookup was made.

THE COURT: She said it was after the letters.

MR. GRUBBS: Could she give us an approximate date?

THE COURT: Could you do that?

THE WITNESS: To the best of my recollection a few months later.

BY MR. ORSECK:

Q You heard Mr. Hudson in court the other day?

A Yes.

Q And he testified that sometime after the November letter he checked for violations and there were none?

A Right.

MR. ORSECK: I call upon Mr. Colin --

THE COURT: Don't call upon anyone that way in the courtroom.

Do you want to come up?

MR. ORSECK: All right.

(At the side bar.)

THE COURT: What are you seeking here?

MR. ORSECK: I state for the record as an

1 officer of the court that I saw in Mr. Lieber's file, Jerry
2 Lieber, this past summer, a letter from Mr. Colin: Are
3 there any sewerage violations?
4 Mr. Lieber's answer: None.
5 Now I call for the production of those, not
6 in the presence of the jury, I represent to you, Judge, that
7 I saw them and I don't have copies. I cannot get them.
8 THE COURT: Can we stipulate to that fact that
9 you made inquiry --
10 MR. COLIN: I will have to look but I don't
11 know what it will prove.
12 THE COURT: Go through your correspondence file
13 here and produce that correspondence.
14 (In open court.)
15 BY MR. ORSECK:
16 Q Mrs. Huss, at Mr. Colin's request, have you
17 and I together furnished him with virtually every one of the
18 original leases on your property for a good number of years
19 back through 1975?
20 A To the best of my recollection, yes.
21 Q Have we also given him every one of your in-
22 come tax returns?
23 A Yes.
24 Q Tell the jury what your rent schedule was this
25

past year?

MR. COLIN: I object to that.

THE COURT: Overruled.

A I believe it was about $16,000 to $17,000.

Q Tell us how much you got per unit and for which units. Not for all 29 of them.

A My one-bedroom units average about $730, $750.

My two-bedroom -- there are three of them -- I believe one is $960, one is $925, and the newest one is $880.

Q How many of the 29 units were in the 700s?

A About 25.

#15 MR. COLIN: This is for the season of 1976?

THE WITNESS: Yes. It was not fully rented.

Q Is it true to answer these questions unit by unit -- there were 29 units and we are talking about five or six years -- you would have to give me 180 separate answers and look at 180 separate exhibits?

A Yes.

Q I am asking you in generality, in 1972, what did those same units rent for? Take it right up through 1976.

A In 1972 they were, the one-bedroom, $625 to $675, I believe.

The two-bedroom, they were $725, somewhere around that.

Q Let me withdraw the other question.

Did the rents gradually rise from those to 1976, as you just told us they were?

A Very slightly.

Q Tell the jury whether or not you attempted to get higher rents.

MR. COLIN: I object to that.

THE COURT: Correct me if I am wrong, but wasn't there a cross-examination of Mr. Edison about an operator endeavoring to maximize rents? There was, was there not?

MR. ORSECK: Yes.

THE COURT: I will overrule the objection.

MR. COLIN: This calls for a conclusion.

THE COURT: I will overrule the objection.

Ask the other question.

Q Did you try to get higher rents during this period of time?

A Yes, of course.

Q Wereyou able to get higher rents?

A No.

MR. COLIN: That isobjected to and I move

to strike.

THE COURT: This calls for a conclusion where I think the situation requires the demonstration of factual occurrences from which the jury may draw its own conclusion.

I will sustain that objection on the ground of form.

Q It is true, is it not, that a lot of your guests continued to come back during this period of time?

A Yes.

MR. ORSECK: I have no further questions.

(Continued on next page.)

CROSS EXAMINATION

BY MR. COLIN:

Q Mrs. Huss, I direct your attention to Plaintiff's Exhibit 61 in evidence which is the general release that you signed and delivered to Cities Service Oil Company. Do you know the document I am referring to?

A 61 is not the release.

Q I show you the document so we both know what we are talking about.

A The release that I signed and executed in court is the other one.

Q I am directing your attention to Exhibit 61 which is before you.

THE COURT: Put a question.

Q Is that a copy of a document executed by you and delivered to Cities Service Oil Company?

A It is a document I signed in the presence of Ted Drew, my then attorney.

Q What is your answer to my question, Mrs. Huss?

A No.

Q Did you sign it?

A I signed this.

MR. ORSECK: I will stipulate --

THE COURT: Counsel, please.

Q Where did you sign the document?

A In my attorney's office.

Q Who was there at the time you signed the document?

A Ted Drew and myself.

Q Is Ted Drew your attorney?

A He was then.

Q Did he prepare the document?

A It seems to me his secretary did.

Q Did he hand you the document and ask you to read it and sign it?

A He may have or his secretary may have. I don't recall.

Q When you were with Mr. Drew in his office, what did he say to you in connection with this document?

A It is just a form.

Q Did he say it was a release?

A No. It is just a form. The release was not executed in court.

Q Mrs. Huss, I want you to tell me what Mr. Drew said in connection about that, the original of that document, of which you have a copy.

MR. ORSECK: I object. She said she does not know if he handed it to her or the secretary.

Q Did he say anything more than the words, "This is

a form"?

A Not to my recollection, no.

Q Did he tell you it is a form of release?

A No.

Q Did you ask him what kind of form it was?

A No. I assumed it was --

Q Did you ask him what kind of form it was?

THE COURT: The answer is no.

A No.

Q Did you read the document?

A I probably scanned it briefly.

Q After you scanned it did you understand that it was a release document?

A On scanning it I noted the reference to the document --

MR. COLIN: I move to strike the answer as not responsive.

Q After you scanned it, did you understand that it was a document of release?

A No.

Q What did you believe it to be if you had any understanding?

A Just a form.

Q You believed it to be a form?

A Yes.

Q A form with no meaning?

A Insignificant meaning.

Q What was the insignificant meaning that you attached to the form?

A I didn't give it any thought.

Q You didn't give it any thought?

A No.

Q Was your meeting with Mr. Drew on the day that you settled the case with Cities Service and Monticello Gas & Oil?

A I don't recall.

Q Was it at or about the day of the settlement?

A It may have been or it may have been a day or two later or a week later. I don't remember.

Q Did Mr. Drew ask you to come into his office?

A Probably he did.

Q Did he explain to you that he wanted you to sign a release document?

MR. ORSECK: This is now the fifth time; isn't it?

THE COURT: Overruled.

Did he?

A To sign a form.

Q When he said to you, "Come into my office," did

he say it by phone?

A I don't remember.

Q And he said, "I want you to come to my office to sign a form;" is that right?

A Probably.

Q I am asking you what you remember.

MR. ORSECK: That is argumentative.

THE COURT: Overruled.

What is your best recollection?

THE WITNESS: I really don't remember, sir.

Q But you do remember that after he asked you to come into his office you did go into his office?

A I probably did, yes.

Q Did you probably or did you in fact go into his office?

A I would assume I went into his office, yes.

Q Don't you remember going into his office?

A This took place a number of years ago.

MR. COLIN: I move to strike as not responsive.

THE COURT: I will let it stand.

Q Do you remember going into Mr. Drew's office?

A I have gone to Mr. Drew's office on many occasions.

Q Do you remember going into Mr. Drew's office in connection with your signing the original of that release

form?

A With my signing the original of this?

Q Yes.

A Not specifically. The day or the time, no, sir.

Q I didn't ask you if you remember specifically the day or the time. I asked you whether you remember the occurrence, Mrs. Huss, and do you?

A Vaguely. Very vaguely.

Q Did you have the understanding that you were signing a paper to release the Monticello Gas & Oil Company and Cities Service Oil Company from the claims you had filed in the lawsuit?

A No, sir.

MR. ORSECK: Objection.

I wish to raise another argument which I did not think of previously if we may approach the bench.

THE COURT: Let's proceed.

Q Did your lawyer say or do anything to give you an understanding that he was asking you to sign a release form?

A No, sir.

Q Did you know you had settled a lawsuit?

A No, sir, not in its entirety.

Q Did you know you had settled a lawsuit in any

terms?

A Conditional.

Q Did you know you received money in connection with the settlement of the lawsuit?

MR. ORSECK: I object to the form, in connection to the partial settlement.

THE COURT: I will sustain it as to form.

Q Did you receive money in connection with the lawsuit that you brought against Monticello Gas & Oil Company and Cities Service Oil Company?

A A very minimal amount.

THE COURT: Yes or no?

Strike out the answer.

A Yes.

Q How much did you receive as the total sum that you call a minimal amount? Was it $12,500?

A Approximately, yes.

Q Was it exactly that?

A Yes. Probably.

Q Mrs. Huss, I am going to read you a part of your letter which has been marked as Plaintiff's Exhibit 63 in evidence and then I am going to ask you a question, so listen to what I am going to read and then answer the following question:

"September 20, 1972, New York State Environmental and Conservation Department:

"Gentlemen: In April of this year I wrote to Senator Buckley regarding my property named below. I advised the senator of the gross pollution of both my lakes and land as a result of inadequate provisions for disposing of sewerage and overspills of oil."

My question to you is this: In what way was sewerage discharged on your land?

A There was some private homes with inadequate sewerage disposal units.

Q They were in the vicinity if your property, were they?

A Yes.

Q Were they on higher land than your property?

A Yes.

Q Did you observe that raw sewerage descended from those homes onto your property?

A Yes.

Q When did you first observe that?

A I don't remember the exact date.

Q What year?

A Probably around 1972.

Q That was the first time you observed it?

A Yes.

Q Tell me what you observed, Mrs. Huss.

A Well, I observed some debris, some sewerage, some substance, some discharge on my property.

Q And this substance discharged on your property was human waste, was it not?

A I didn't say human waste specifically, no.

Q It had a strong odor, didn't it?

A Not particularly, no.

Q It did not have a strong odor?

A It had an odor.

Q A noticeable odor?

A Yes.

Q An odor of raw sewerage?

A Yes.

Q I will ask you this question after reading a part of your letter:

"I filed numerous complaints to the local Health and Conservation officers resulting in no more than a token acknowledgement of my complaint."

My question to you, Mrs. Huss, is, how numerous were the complaints that you filed with the Health and Conservation officers?

A I don't remember but this was probably an

exaggeration.

Q It was not numerous?

A Some.

Q How many would you say?

A I have no idea.

Q Over what period of time did you file these numerous complaints?

A I would assume in 1972.

Q Do you know?

MR. ORSECK: Objection. That is argumentative. He asked her the question.

THE COURT: Let's hear the last answer back.

(Answer read.)

THE COURT: Put another question.

Q Do you know when you filed the complaint?

A Specifically I don't remember, no.

Q Would you say thatyou did not file any in 1971?

A I can't answer that. I don't know.

Q Do you admit the possibility that you did file some of these complaints in 1971?

MR. ORSECK: Your Honor, that is beyond permissive cross examination. Anything is possible without asking the question.

THE COURT: I will allow it.

Answer it.

A I really don't remember, your Honor.

Q I will read from the same letter:

"As of this writing I own 26 plus acres operated as a summer bungalow resort. To state that it is also being used as the area sewer would not be an overstatement."

What did you mean when you stated that your property was being used as the area sewer?

A I meant to use strong language to evoke rapid action to correct conditions such as they were.

Q By "area sewer," did you mean an area that was being flooded with raw sewerage from other properties?

A No, sir. I meant impact words, strong language, as I described.

Q What does "sewer" mean to you?

A This is what was meant when I wrote it.

Q That it was a property that was receiving sewerage from other properties?

A No. I meant to be emphatic and I employed the use of strong language to evoke prompt action.

Q Mrs. Huss, I want to make things clear between us.

MR. ORSECK: I object to that.

THE COURT: Sustained.

Q Mrs. Huss, was your property flooded with

sewerage from other properties?

A No, sir.

Q Did your property receive raw sewerage from other properties?

A A minimal amount.

Q When you say "a minimal amount," do you mean you could not see it?

A It was visible.

Q When you say "a minimal amount," you mean you could not smell it?

A Some.

Q You could smell it some?

A Yes, sir.

Q I ask you, Mrs. Huss, why if you received a minimal amount of sewerage did you want to use strong words and make a strong impact by writing this letter?

A Because I feel very strongly about good clean environment. There is little enough of it left for us.

Q That's why you said what you said in the way you said it?

A Exactly, sir.

Q Now, I will read to you from Exhibit 64, which your lawyer marked in evidence, and then I will put a question to you; page 2:

"In addition to the discharge of oil as observed by the local health officer Jerry Rosenberg, and as presented in the testimony by the defendant in aforementioned court proceedings, there is a heavy discharge of raw sewerage to my property."

I would ask you, Mrs. Huss, to tell me what you meant when you used the words "heavy discharge."

A Exaggeration for the reasons I explained before.

Q The words "heavy discharge" were not true, in fact, is that what you are saying?

A No.

Q You are saying they were not true?

A That's correct.

Q Do you frequently exaggerate when you make statements?

MR. ORSECK: That is not proper cross examination.

THE COURT: Overruled.

A At times.

Q Now, I am going to read to you further from the same letter:

"This has been traced to almost every dwelling on Cold Spring Road, private as well as commercial."

My question to you, Mrs. Huss, is whether that was a true statement or an exaggerated statement.

A Exaggerated, sir.

Q So it was not true that the sewerage came from almost every dwelling on Cold Spring Road, private as well as commercial, was it?

A It could not.

Q Was it true?

A Not entirely, no, sir.

Q Was it partly true?

A Yes, sir.

Q Sewerage did come from dwellings on Cold Spring Road to your property; is that right?

A Some, yes, sir.

Q Did you find it offensive?

A Yes.

Q Mrs. Huss, at the time that you were complaining about the oil spill and the sewerage, you filed an application with the public authorities to install 17 mobile homes, did you not?

A Yes. I may have.

MR. COLIN: I ask that this be marked for identification.

xxx (Defendant's Exhibit N marked for identification.)

MR. ORSECK: If the purpose is to offer it in

in evidence, no objection.

MR. GRUBBS: No objection.

MR. COLIN: I am offering it.

THE COURT: It will be received.

xxx (Defendant's Exhibit N received in evidence.)

Q Mrs. Huss, at the time you filed this application to install 17 mobile homes, you were optimistic that you could make money by doing so; is that correct?

MR. ORSECK: Objection, your Honor.

THE COURT: Overruled.

A No, sir.

Q Was this a serious application filed by you, Mrs. Huss?

A Not entirely.

Q This was an exaggeration?

A It was a beautiful dream shattered by Cities Service.

MR. COLIN: I move to strike the answer.

MR. ORSECK: It was asked and answered.

THE COURT: I will take it through "it was a beautiful dream," and strike the rest. The jury is to disregard the balance.

Q Was your beautiful dream a dream of making money by installing additional units for occupancy on your premises?

A If the property would lend itself to occupancy, yes.

MR. COLIN: May I ask that the witness be responsive.

THE COURT: I think she was being basically responsive. You may continue.

Q This application was filed by you on September 22, 1972, while your prior lawsuit was still pending, was it not?

MR. ORSECK: Objection to the form and to the content and everything else.

(Question read.)

THE COURT: Sustained as to the form of the question.

Q Mrs. Huss, when you acquired the Doralee property in 1965 there were no mobile homes there, were there?

A No.

Q You at a later time installed a number of mobile homes there, did you?

A Not a number of them, sir.

Q Are there mobile homes there now?

A Three.

Q When you referred to "a number of mobile homes," you were referring to the three mobile homes you say are

there?

MR. ORSECK: Why do we have to have the argument and take all day?

THE COURT: Let's go forward.

Q When did you put in those three mobile homes?

A I don't remember.

Q What year?

A One in 1970 or 1971.

Q Was this after you had experienced what you call the oil problem?

A Yes.

Q Was this after you had experienced what we will call the raw sewerage problem?

A Probably.

Q Mrs. Huss, you had overflows of raw sewerage in the Doralee bungalow colony, didn't you?

A No, sir.

Q Never?

A No.

Q I will read to you from your deposition taken in this action and then I will ask you a question; at page 69, line 24:

"Q You know that you have an underground leaching field and septic tanks because at times you have taken off

the top cover of soil and seen what is below.

"A Right."

My question, Mrs. Huss is, did you make that answer to that question?

A Yes.

Q Mrs. Huss, an underground septic system is a system -- and correct me if this is wrong -- where the waste, sewerage waste, from the dwelling units flows out of the sanitary facilities, the toilets and washbasins, through a pipe to a tank in the ground of your property; is that right?

A Yes.

Q And then the waste percolates, flows out, into the surrounding soil from that tank; is that right?

MR. ORSECK: That is not the way it works.

THE COURT: Mr. Orseck, you are not the witness here, please.

MR. ORSECK: Then I object to counsel testifying--

THE COURT: This is cross examination. Overruled.

A I believe you mean the filter system in the underground leaching field? Is that what you are describing?

Q It flows out into the soil?

A Yes. This is a proper sanitary sewer system.

Q It does, doesn't it?

MR. ORSECK: The question was asked and answered.

THE COURT: Sustained.

Q The next question after we asked the prior one, about your taking off the top cover of soil:

"Q Did you do that in order to clean them out?

"A Yes."

Did you give that answer to that question?

A Yes.

Q And did you clean out those septic tanks because they were overflowing with sewerage?

A No, sir.

Q Why did you clean them out?

A They need cleaning sometimes once a year and sometimes once in two years.

Q Because they had too much sewerage in them?

A There is an accumulation, a normal accumulation and the proper maintenance is having them cleaned periodically.

Q Still reading from the deposition:

"Q They overflowed?

"A No, sometimes it would back up into the bungalow."

MR. ORSECK: This is improper use of the deposition.

THE COURT: Come to the side bar.

I sustain that.

(At the side bar.)

THE COURT: Mr. Colin, do you own a house?

MR. COLIN: Yes.

THE COURT: Don't you call a septic tank man to clean out your septic tank in the regular course of business?

MR. COLIN: No.

THE COURT: You are fortunate.

MR. COLIN: I have owned a house with a septic tank for seventeen years without knowing where it was, and, in another instance, eleven years.

THE COURT: I have a house and I call the septic tank man every three years to clean it out. That's standard practice. If you were to talk to my septic tank man he would tell you it is standard practice. I do not regard this as impeachment, saying there is an overflow of waste. It is a standard practice.

MR. COLIN: My last question is where she says it would back up --

THE COURT: That's not an overflow into the field. That's a backup into the toilets in the house. That's one of the ways you know it needs cleaning. It does

not go out into your property, it comes into your house, which is different than what you are trying to indicate, that it overflows out into the land and around in the land. That it does not do.

I regard this as non-impeaching and, therefore, I sustain the objection to it.

Now, while I have you here, it is three-thirty and I have motions this afternoon. It would appear that the case will be concluded sometime tomorrow morning? How much more as far as cross-examination?

MR. COLIN: Maybe an hour.

MR. GRUBBS: I have about an hour.

THE COURT: That's twelve o'clockish tomorrow. You have no more witnesses?

MR. ORSECK: Five more minutes of deposition, your Honor.

THE COURT: Then you rest and we will argue motions.

What do you have in the afternoon?

MR. COLIN: We have motions.

THE COURT: It would appear probable that the case will not be dismissed on the law. I am not expressing a firm opinion. I am keeping an open mind, but it would appear likely.

MR. COLIN: After you hear me you may change your mind.

THE COURT: Nevertheless, suppose the motions are adverse to you?

Are you putting in any proof?

MR. COLIN: I don't think he should.

MR. GRUBBS: As it stands now, until the other gentleman rests, so far as I know I may not need any.

THE COURT: Are you going to put in any proof?

MR. COLIN: Yes.

THE COURT: Are you going to call witnesses?

MR. COLIN: Yes.

THE COURT: How much time do you think those witnesses will require?

MR. COLIN: A few hours.

THE COURT: The balance of the day?

MR. COLIN: I don't know how they will break.

THE COURT: It is perfectly obvious on Friday we will go over to Tuesday. The only question is when on Tuesday. Monday I am sitting in the Court of Appeals.

We will go over to Tuesday in some fashion and we will work that out from there.

MR. COLIN: May I say this on this overflow question: If the septic system backs up, that means the

pgem

ground is supersaturated.

THE COURT: You may not necessarily draw that inference. That's not proof that the ground is saturated.

MR. COLIN: Your Honor is foreclosing me on this line?

THE COURT: That's not impeaching. It backs up into the house and that doesn't justify -- Call your septic tank man and ask him.

(In open court.)

THE COURT: Ladies and gentlemen, you are all in your first week of service. I am guiding myself accordingly. From what counsel tell me we are going to go a little bit into next week. I have other duties in a different court on Monday so I cannot preside here and, therefore, we will sit all day tomorrow, and then we will resume on Tuesday morning. You may keep that in mind in connection with your scheduling.

I will excuse you tonight until tomorrow morning at ten o'clock. I tell you this so you can, as of now, begin to think what you should do. We sit tomorrow, and then we will be in recess until Tuesday.

Probably I will charge you sometime during Tuesday if things go as we now anticipate.

You are excused until ten o'clock in the

pgem

morning.

(At 3:40 p.m. the proceedings were adjourned to January 7, 1977, at ten o'clock a.m.)

* * *

#16

DORALEE ESTATES, INC.,
vs.
CITIES SERVICE OIL CO., 73 Civ. 907
vs.
MGO CORPORATION

January 7, 1977
10:10 a.m.

THE COURT: There has been some distress asserted to me from certain quarters as to my admitting the hearsay through Mr. Edison of what other comparable bungalow colony owners charged for comparable units at various times. While I have done some research I did not feel any insecurity in the propriety of that ruling and I want to advise that since the case is going over to Tuesday, and particularly in view of the fact that I told Mr. Grubbs yesterday in the robing room, and I am sure Mr. Colin was present at the same time, there is adequate opportunity for any investigation that the parties may wish to make to produce countervailing proof, if such exists, I will receive that proof on Tuesday, if the parties wish to adduce it.

Mr. Colin inquired as to all of the names of all of the various colonies and where they are located so he will be checking into that.

MR. ORSECK: Before we start, I know there have been intermediary rulings with respect to the general release. I would now call to the Court's attention that the

so-called general release recites "In consideration of a sum" which is the same recitation in the actual stipulation of settlement made on the record. It would seem, again, even though at the last juncture your Honor indicated that issue would go to the jury, it seems that the document itself is superfluous and there was no requirement it be executed and it had no legal effect, whatever date it had on it, because there is no showing in this record, nor can there be any showing, that the stipulation of settlement was any different than that indicated in open court.

By way of analogy, assume that the stipulation of settlement provided for installment payments and the first payment was July 1st and a check was sent: We enclose July 1, first payment; and the second payment is due and the one who sends the payment says: We enclose the July 1 payment.

There is no need to send the letter of transmittal. It does not bind anybody. It is not evidence that there was any alteration of the stipulation of settlement.

In the analogy I use an issue such as that could go to the jury if there was at least parol testimony that we subsequently agreed that there would be two payments in July. Here we don't have any testimony that it was subsequently agreed that --

MR. ORSECK: That's the nature of my argument, your Honor.

THE COURT: I still think under these circumstances I will leave it for the jury.

(Short recess.)

(Jury in box.)

MR. ORSECK: Although we are in the midst of cross-examination I would call to the Court's attention that Exhibit 10 or 11, the one I handed tothe Court, had either not been offered or had been rejected by the Court at an earlier stage.

I would now offer --

THE COURT: It is not your turn to offer anything at this point. We will come to a time when you can do that.

You may proceed, Mr. Colin.

(Continued on next page.)

CONTINUED CROSS EXAMINATION

BY MR. COLIN:

Q Mrs. Huss, It is a fact, is it not, that from time to time sewerage backed up into the bungalows at Doralee?

MR. ORSECK: Your Honor --

THE COURT: I will allow that.

A On rare occasions.

Q How often did it happen?

A Some areas --

MR. ORSECK: Objection.

THE COURT: Overruled.

A Some areas once in five years. Eight years have gone by. Another time it may have been two years.

Q Between your purchase of the property in 1965 and the date September 25, 1973, how many times did sewerage run over into the bungalows?

MR. ORSECK: I object to the form.

THE COURT: Sustained.

Mr. Colin, I have given you latitude but I have given all I am afraid I am going to give you at this point.

Q When the sewerage ran over in the bungalows --

THE COURT: She did not say that.

(Pause)

Q Mrs. Huss, I will ask you, after reading from your deposition, a question --

MR. ORSECK: Your Honor --

THE COURT: May I see what is to be read before it is read.

(Pause)

(At the side bar; only Mr. Colin and the Court present.)

(Continued on next page.)

THE COURT: You may ask her whether there was any sewerage flowing out of any tanks out of the ground into the lake, but this --

MR. COLIN: Your Honor, this has relation to the desirability of her facilities. This has a clear relationship.

THE COURT: Not at all. You want to ask her that --

MR. COLIN: I don't want to ask her in that way.

THE COURT: Unless you put it that way, no.

MR. COLIN: I want to find out whether there were any odors or unpleasant appearances.

THE COURT: You may ask her that. You have been going on the theory that this was sewerage that ended up in the lake. The whole thrust of the questioning yesterday was that ifthese things backed up into the cottage itself it was an indication that it went into the lake. You told me that last night.

MR. COLIN: I was dealing with the cesspool itself. I believe that's so. Because a cesspool leaches underground --

THE COURT: You are not an expert witness on that. Unless you want to get expert testimony on that --

MR. COLIN: I want to deal with this feature.

THE COURT: But on an entirely different basis. You are asking her these questions before you impeach her, and in my judgment this does not impeach her.

MR. COLIN: Let me ascertain the effects of this backing up.

THE COURT: You may ask her that.

(Continued on next page.)

(In open court.)

Q Mrs. Huss, on occasions when there was a backup of sewerage into bungalows, what was to be seen?

A Sometimes a toy a kid dropped into the toilet had to be removed with a roto-rooter.

Q I am talking about the occasions --

A That was one or two occasions.

Q When there was a backup into the bungalow?

A That caused a backup.

Q What sewerage did you see and where did you see it?

A I saw normal sewerage on the inside of the bungalow caused by a toy being dropped into the toilet by a child.

Q Putting aside the cause, Mrs. Huss, did you see sewerage on the bungalow floor?

THE COURT: I will sustain an objection to further cross examination along this specific line. We are not interested if there was a backup of a toilet because a toy is dropped in the toilet. Further examination of what was caused by a toy-related backup, the objection is sustained.

Q Mrs. Huss, on how many occasions were there backups of this character?

A Very few.

Q How many?

A Two or three times.

Q In what period of time?

A Through my ownership of the property. Maybe another time. That's to the best of my recollection.

Q Did you have your septic tank system cleaned out during the period of your ownership of the property?

A Yes.

Q How many times did you clean out your septic tank?

A I don't remember.

Q How many times to the best of your recollection?

A I would say a maximum of possibly six times.

Q You cleaned out the septic tanks because you had reason to believe that they were full of sewerage; is that correct?

A I was not taking any chances. If I thought or suspected in the least that there might be a problem, I called in Roto-rooter.

Q On at least six times you thought or suspected that there might be a problem?

A That there could be.

Q And you called in Roto-rooter?

A Yes. I called in for protective maintenance.

MR. COLIN: I ask that this document be marked for identification.

xxx (Defendant's Exhibit O marked for identification.)

MR. COLIN: I ask that this document --

MR. ORSECK: It is the original of 27. I consented it go in evidence.

THE COURT: It will be received.

MR. COLIN: This is a different document --

MR. ORSECK: I consent that be in evidence.

THE COURT: It will be received.

xxx (Defendant's Exhibit P received in evidence.)

MR. COLIN: The other one will be O in evidence.

xxx (Defendant's Exhibit O received in evidence.)

Q Mrs. Huss, I show you the document that has been marked as Defendant's Exhibit O in evidence, and I ask you whether your signature is on it?

MR. ORSECK: Your Honor, it is obvious. I consented it is an original --

THE COURT: Overruled.

(Pause)

A This is the form that I signed in Ted Drew's office.

Q That is the original of the document that you yesterday said your lawyer told you it was a form; is that right?

A I knew it was a form. This is not the original stipulation which was executed in the court.

Q That is a copy of the stipulation --

A That is a copy of the form I signed in my lawyer's office.

Q Mrs. Huss, look at the document, please.

A I did.

Q Do you see that your signature is signed in ink?

A Yes, sir. I said I signed the form.

Q Would you look at that form, as you call it, and tell me whether it has the corporate seal of Doralee Estates impressed on it.

THE COURT: The exhibit speaks for itself. Does it have it on it?

MR. COLIN: It does.

Q Did you put that corporate seal on it?

A I don't remember. If it is there somebody put it there. Perhaps my lawyer.

Q Did you keep the corporate seal in your possession?

A Yes.

Q Did you bring the corporate seal to the lawyer's office on the day you signed this document?

A If I was asked to bring it I would assume that I did.

Q You notice it is impressed on the document. Does that refresh your recollection that you brought the seal with you?

A I said I would assume that I did.

Q Do you see on the document that there is an acknowledgement before a Notary Public?

A Yes.

Q Do you see the words on this so-and-so date of April, 1972, before me personally came Dora Huss to me personally known --

MR. ORSECK: It is in evidence and speaks for itself.

THE COURT: I sustain that.

What is the question that follows from that?

Q Did you acknowledge executing this document before a Notary Public?

A I said I did. This is a form and not a document. You refer to it as a document.

THE COURT: Lawyers sometimes do so do not be concerned, Mrs. Huss.

Q Did you on the same day execute another document in a form of a release by Doralee Estates to Monticello Gas & Oil Company?

MR. ORSECK: Whatever is being handed to the witness we consent it be received in evidence.

MR. COLIN: It has been so received on your consent.

THE CLERK: That is Exhibit P in evidence.

A This is the same form as this one (indicating). It is a form.

Q And it runs in favor of Monticello Gas & Oil Company from Doralee?

A Yes.

Q You signed it just as you did the other one?

A Yes.

Q You put the corporate seal on it just as you did the other one?

A That's right.

Q And you acknowledged it before a Notary Public just as you did the other one; is that right?

A As a general form, yes.

Q Your lawyer was present?

A Yes.

Q When you read and signed this document, you

observed, did you not, that it had a copy of the Court stipulation of settlement attached to it; is that correct?

A Yes.

Q Did you know from the fact that the Court stipulation was attached to the release form that it was a release of your claims in the Court action?

A No, sir.

MR. ORSECK: Hold it.

THE COURT: Please.

Q What did you think you were signing?

THE COURT: We went through this yesterday. Do you have a specific reason for asking in the case of Monticello?

MR. COLIN: I don't think yesterday we addressed it in terms of the proof now adduced.

THE COURT: Which proof?

MR. COLIN: The fact that the Court settlement was attached to this document to give her an understanding as to what it was about.

MR. ORSECK: That is all the more reason why my renewed motion should be granted. The release says, pursuant to the specified terms --

THE COURT: I know. I understand.

I do not really see that much difference. I

think it was covered yesterday but I will let you cover it again.

Q My question to you, very simply --

THE COURT: What did you think you were signing?

THE WITNESS: I was signing to the effect that I was receiving some money. That's all.

Q And releasing your claims?

A No, sir.

Q You didn't know you were releasing your claims?

A I knew I was not.

Q Did you believe that you were receiving $12,500 from Monticello and Cities Service and not releasing your claims in exchange for that money?

A Absolutely.

Q You were keeping your claims and they were giving you money?

A That's correct.

Q But you are willing to be bound by whatever those documents say, aren't you?

MR. ORSECK: Your Honor --

THE COURT: Sustained.

Q Let me put it this way: You signed those documents in the presence of your lawyer, didn't you?

THE COURT: Yes. That has been established two

three or four times. Let's go on to something else. We spent twenty minutes on this yesterday.

Q Mrs. Huss, you were in court in the prior action on or about the 25th day of September, 1972, were you not?

A Yes.

Q At that time you heard the lawyers in the case and the judge say certain things, did you not?

A Yes.

Q You agree, do you not, that the paper attached to the release is a copy of the words that were said by your lawyer, the lawyers for Cities Service and Monticello Gas & Oil and the judge and yourself at that time; is that correct?

A In part.

Q Let's put it this way, please: The three pages of the court transcript that are attached to this release that has been marked as Exhibits O and P were read by you at the time you signed the release; is that correct?

MR. ORSECK: That question is most confusing.

THE COURT: It is. I sustain the objection.

MR. ORSECK: Secondly, I ask the Court to instruct the jury that the stipulation made in court binds all parties --

THE COURT: Counsel, the problem is we are talking

about a release. She is talking about a form. You are using one word and she is using another word.

MR. COLIN: I will go along with her characterization.

THE COURT: It is not a question of conforming to her characterization. It is a question of her testimony about this matter. It is not your testimony but her testimony about this matter. We are not talking about her characterization. You have elicited questions from her as to an understanding. We will deal with that. We are not going to substitute your understanding. You are a lawyer. You may call it something. She calls it something else.

MR. COLIN: Your Honor --

THE COURT: Counsel, we are dealing with the testimony of a witness and you will deal with that witness' testimony and you will not inject yourself into this as an attorney.

MR. COLIN: May I be heard?

THE COURT: You may not. You may put another question at this point. The whole thing has to do with the admissibility of that last question. I sustain an objection because she does not call it a release and, therefore, the question had no foundation for her. You may put another question.

MR. COLIN: I said --

THE COURT: You may put another question.

Q Mrs. Huss, Exhibits O and P, which are the forms that have been referred to in your testimony have attached to each of them three pages of a court transcript. You are aware of that, are you not?

A I'm not aware of what is on there right now. I would have to look at it.

Q You are aware they are attached to this form?

A I see some papers attached but I don't know what it is unless I read it.

Q You and your lawyer have a copy of these papers?

A If I don't know what they are I can't answer that.

Q I will show you again what they are and what I am referring to (handing).

(Pause)

MR. ORSECK: Your Honor, Exhibit 60 in evidence --

THE COURT: Counsel, please, do not interject anything into this. We are having an interrogation of the witness. Let's go forward and proceed with proper questions.

MR. ORSECK: Yes, your Honor.

(Pause)

THE COURT: You may proceed, Mr. Colin.

MR. COLIN: I will read from the exhibit.

Q (Reading):

"Q This payment of $12,500 by the defendants to the plaintiff settles and compromises and extinguishes any and all claims that the plaintiff has or might have or will have against these defendants for the alleged nuisance and negligence from the date of purchase of these premises by the plaintiff to the present date, April 25, 1971," and I read further the words of the Court: "Now, Mrs. Huss, as president of Doralee Estates, Inc., you have just heard read to you the stipulations and agreements by your lawyer and the lawyers for the defendants. Do you consent and agree to the answers set forth in this stipulation?

"A Yes."

My question to you, Mrs. Huss, is whether after the proceedings that were recited in this stipulation which I have read to you, did you understand that Doralee was releasing its claims against Monticello Gas & Oil --

MR. ORSECK: Hold it.

THE COURT: Overruled. Let her answer.

A You omitted the conditional stipulation in your reading.

Q Would you answer my question.

MR. ORSECK: She did.

THE COURT: She did answer it.

Q Mrs. Huss, Doralee bought the bungalow colony in 1965; is that correct?

A Yes.

Q Did you examine the premises and the area around the premises before the purchase was made?

MR. ORSECK: Your Honor, it does not make a bit of difference if she did or did not.

THE COURT: I sustain the objection.

Q Did you observe before you made the purchase that the MGO plant was in existence before you bought your premises?

MR. ORSECK: Irrelevant.

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: Let me address Mr. Grubbs with a question here:

The only ground that it seems to me this is in any way admissible is on some theory of contributory negligence which I think you have asked me to charge. My law clerks and I do not see how contributory negligence is in this case at all, and I might ask you at this point whether you are pressing that as a charge.

MR. GRUBBS: I was under the impression as to plaintiff's case there was a count in negligence.

THE COURT: What is the contributory negligence on this record that you claim the jury ought to be considering? In what way are you contending she contributed to it?

MR. GRUBBS: If there were steps she could have taken to minimize any damages, she had that obligation to do so.

MR. COLIN: There is an assumption of risk.

THE COURT: What is the basis for your questioning? That's the second phase of my inquiry here. That she assumed the risk you would spill oil on her land?

MR. COLIN: She assumed the risk --

THE COURT: That there was going to be an oil company that was going to conform to all the appropriate regulations and care in the operation of its property? Did

she assume the risk that MGO was going to spill oil on her land?

MR. COLIN: No.

THE COURT: I will sustain the objection.

MR. COLIN: May I say this, with all due respect: You chastised me before this jury. I think it hurt us considerably. I point out, sir, that I spent hours --

THE COURT: You have been using words again and again, and Mr. Orseck didn't object to it, but you had a number of times said, "Isn't there annexed to this release so-and-so?"

You used the phrase "annexed to this release."

She told you half a dozen times that it was not a release. She didn't understand it to be a release, and all you were doing by those questions was wafting into the jury box your contention that this was a release, and, therefore, here characterization of it was an evasion. I felt that that was an unfair area of questioning. It had gone on for four or five questions. I was sensitive to what I thought was unfairness. You kept emphasizing again, and again, and again, that she didn't understand it.

MR. COLIN: I said I would accept her characterization.

THE COURT: But you persisted in that in a way

I found improper. You wanted to continue to argue. All I wanted to do was rule on the evidence question and go on.

MR. ORSECK: To save another trip to the side bar, our last session here, your Honor instructed Mr. Colin to go through his file with respect to the documents I saw at the Department of Health, the letter he wrote asking about sewerage violations.

MR. COLIN: Can't we wait on that?

MR. ORSECK: I have a right to ask a question.

MR. COLIN: I told Mr. Liddle to do it.

MR. LIDDLE: We did it and you rested your case. I have the documents.

MR. ORSECK: He says he has them.

THE COURT: Turn them over now.

MR. LIDDLE: Can we do that in a recess? They are in a file.

THE COURT: We will do that at the first recess.

(Continued on next page.)

(In open court.)

Q Mrs. Huss, when you bought the Doralee property the total price was $70,000?

MR. ORSECK: That is a contravention --

THE COURT: Strike it out. The jury will disregard it.

MR. COLIN: That was stated affirmatively by plaintiff's counsel.

THE COURT: Ladies and gentlemen, I will excuse you.

(Jury left the courtroom.)

(Continued on next page.)

THE COURT: What was the purpose of this question?

MR. COLIN: It bears on damages, sir.

THE COURT: In what way?

MR. COLIN: Total cost of the property, as a matter of law, would represent the ceiling for any possible recovery. You cannot recover for injury to property more than the value of the property.

MR. ORSECK: That's specious and frivolous.

THE COURT: I am very troubled by this. I made a ruling. Mr. Orseck made an objection the other day when you wanted to get into the question as to whether she was getting fair rental value on her investment. I had ruled that what she paid for this property was utterly irrelevant. I ruled that specifically at the side bar. It is in the transcript. I made it specifically at the side bar.

This is the kind of evasion of a ruling, if you want to make it you have to check with the Court.

Mr. Colin, I find it incredible you should ask that question after I had said in a sidebar conference that what she paid for the property was wholly irrelevant. I said she might have gotten it by a gift, by devise, any number of ways. I specifically made that statement, did I not?

MR. COLIN: I remember that remark, but I remember affirmatively Mr. Orseck said in his case, and proof was adduced in his case, that the property was bought for $70,000, and $10,000 was paid as a down payment. That's in the plaintiff's case.

THE COURT: I don't remember that.

MR. ORSECK: That's an out-and-out falsehood. I will discontinue the case if it is in the record.

THE COURT: I don't remember hearing that at all. I remember Mr. Orseck vigorously objecting to these facts coming out, and I remember making a ruling at the side bar that this was inadmissible.

MR. GRUBBS: If your Honor please, as I recall the facts, it was either in the opening or some time thereafter that that figure was given to the jury by counsel or a witness.

But the other thing I would like to say, is that he, himself, has put into evidence a statement by the plaintiff of what she claims was her investment in this, and I think that counsel should have the opportunity to cross-examine.

THE COURT: Where is that statement?

MR. GRUBBS: In the exhibit that the plaintiff put in, whatever the number of the exhibit is. It is in

pgem

evidence before the jury.

MR. COLIN: The letter to the Department of Conservation about the sewerage. I remember Mr. Orseck giving those figures. It may have been in his opening or it came later, but I do remember it.

She says in this document, "Conservatively my investment is well over $100,000."

THE COURT: That has nothing to do with what she paid for it. It is not a statement of what she paid for the property.

MR. COLIN: It is an overstatement of what she paid.

MR. ORSECK: It does not purport to be what she paid for it. It is irrelevant in any event.

THE COURT: The subject matter --

MR. COLIN: This $10,000 payment and $70,000 price for this property was put in the record by plaintiff.

MR. ORSECK: You might have read that in a deposition.

THE COURT: I made a ruling at the side bar that excluded that area of inquiry. Why you should feel you could go into it before the jury without even inquiring of me as to whether possibly this very line was not an invasion of that ruling, I find it incredible.

MR. COLIN: That ruling, as I recall it, was in the context of Mr. Edison's examination and whether I could inquire as to the value of that property in that context. I think that the question I am asking now, which is related to the question of damages, to the question of the amount received by the plaintiff in the prior settlement in relation to the cost of the property, the cash investment in the property, is relevant.

THE COURT: The damages the plaintiff is seeking here is the difference between the rentals she could have gotten with comparable property and has nothing to do with what she paid for it in the beginning. Her damages had to do with what it would cost her to clean the six or seven inches of the oil-soaked earth from the bottom of the lake. That has nothing to do with what she paid for the property. It has nothing to do with it at all.

MR. COLIN: That's the plaintiff's theory. I represent a defendant, and I want to show --

THE COURT: How does this bear on this?

MR. COLIN: It bears because she paid a certain amount for the property. She received in a prior settlement a certain sum of money, and I think it is not only proper, but I think it is necessary from the point of view of the defendant's side for the jury to know what --

THE COURT: Suppose she picked it up at a great bargain, so what?

MR. COLIN: I don't know whether she did that or not, but I do know she bought it at these figures. They furnished the figures to us.

THE COURT: Those figures do not bear in any way on the damages that are claimed here, which are the only damages which you have a duty to defend against.

MR. ORSECK: You have stated the grounds of the damage except punitive damages.

THE COURT: I sustain the objection. I will tell the jury to disregard that.

Mr. Colin, before you go nibbling around the edges of a ruling I have made, I would ask you to come to the side bar. I am distressed by this. You observe that I am distressed by it?

MR. COLIN: I observe it and I regret it, but I can only say that the ruling that your Honor refers to was made in the context of the expert witness's testimony. I did not think --

THE COURT: Does it make any difference what the context is at the time? I remember saying in that context it didn't seem to me to make any difference how she got the property or what she got it for. It could have been

given to her. What difference? Suppose she paid nothing?

MR. COLIN: I don't want to argue against a non-fact, but I will abide by your Honor's ruling. I do want to say that I had no intention of disregarding any directions that I understood to limit this.

THE COURT: The Court had no intention of admitting that proof in any way, shape, or form. I still do not.

MR. GRUBBS: If your Honor please, may I, for the record, state that since plaintiff did sue claiming diminution of value of real estate, I think one of the factors to be considered by the jury in determining the diminution, among other factors, is the market value of the property at the time she bought it.

THE COURT: If they were persisting in that claim you would be right, but they are not persisting in that claim. That claim has not been urged by this jury as a ground of damage. It was specifically excluded by them in the application they made at the side bar. I would agree with you otherwise.

MR. COLIN: Let me ask you this question: A party is bound by a judicial statement or admission in opening. It was stated in this case by plaintiff's counsel that she paid $70,000 and had a $10,000 down payment. My

question to you: Am I going to be foreclosed from making reference to this judicial admission when I sum up in this case?

THE COURT: I don't remember hearing that at all. I don't remember it being a general admission.

I suggest before you do that you get Mr. Golden to type up those minutes so you may look at them. I say at this point you are not to make reference to it until you have assured yourself in an authoritive way that that statement was made.

MR. COLIN: Very well.

MR. ORSECK: In case there is to be anything further, the Court should be advised of record facts. When the property was purchased it was purchased from a Ruthoser, who was foreclosed a week before.

(Continued on next page.)

(Jury in box.)

THE COURT: The last question and answer are stricken, ladies and gentlemen. You are to disregard it.

BY MR. COLIN:

Q Mrs. Huss, you knew the MGO plant adjacent to your property, did you not?

A At what point do you refer to?

Q What I am getting at, you knew there was an MGO Oil Company, did you not?

MR. ORSECK: I believe this is a circumvention of a ruling again.

THE COURT: I will permit it.

A At some point in time, yes.

Q You knew that the Monticello Gas & Oil Company was the legal entity that operated that oil distributing plant, didn't you?

MR. ORSECK: I have to object, your Honor.

I withdraw it. Let her answer.

MR. GRUBBS: I object. That requires a conclusion.

THE COURT: Yes. That requires a conclusion as to a legal matter which this witness is not qualified to give. It would not be the best evidence. I sustain it.

Q Mrs. Huss, did Doralee purchase petroleum

products?

A Yes.

Q Did Doralee purchase petroleum products from Monticello Gas & Oil Company?

A Yes.

Q Did Doralee purchase petroleum products from Monticello Gas & Oil Company during the period that it owned the premises?

A Some part of that period, yes.

Q Did you understand that the Monticello Gas & Oil Company that you bought petroleum products from was the Monticello Gas & Oil Company in the oil distributing plant on Cold Spring Road?

A The one associated with Cities Service, yes.

MR. COLIN: I move to strike the latter part of the answer.

THE COURT: Leave the word "yes," and strike out the rest.

MR. COLIN: May we have an instruction that that is to be disregarded.

THE COURT: The jury will disregard it.

Q You received bills for your petroleum products, did you not?

A Yes.

Q You issued checks to pay the bills for those petroleum products, did you not?

A Yes.

Q And those bills said at the head, "Monticello Gas & Oil Company," didn't they?

A I don't remember.

Q The checks that you drew were drawn to Monticello Gas & Oil Company, were they not?

A Possibly MGO or Monticello Gas & Oil.

Q Mrs. Huss, you made it a point to observe the Monticello Oil plant from time to time, did you not?

A I made it a point to observe the Cities Service premises where MGO was located from time to time, yes.

MR. COLIN: May I move to strike.

THE COURT: We are talking about a particular geographical location and the ownership or operation is not involved in this answer. I think the jury understands that. They can draw no conclusions from ownership or operation from that answer.

MR. COLIN: May the witness respond to questions without offering gratuitously what is in the question.

THE COURT: Mrs. Huss, listen as carefully as you can do the questions and answer them as simply as you can.

MR. ORSECK: By the same token I think the jury

should be instructed that the manner in which the question was put --

THE COURT: Counsel, never mind. Let's not get into anything of that sort.

Q Did you hear Mr. Greene testify in court in this case that Monticello Gas & Oil Company vacated the plant on Cold Spring Road on February 10, 1973?

A I heard his testimony, yes.

Q Did you have occasion in or about February of 1973 to take note of whether or not the plant was being operated by Monticello Gas & Oil?

A I took note of the bulk tanks being there.

Q Did you take note that the premises had been vacated February 10, 1973?

MR. ORSECK: That calls for a response to a hearsay --

THE COURT: I will sustain the objection as to form.

Q Did you take note that there was nobody in occupation of the Monticello Gas & Oil plant at and about February 10, 1973?

THE COURT: Overruled.

A No.

Q Did you take note that somebody was occupying the

plant and its offices at that time?

MR. ORSECK: My objection is only to the words "take note."

THE COURT: I sustain that as to form.

Q Did you observe whether anyone was occupying the offices of that plant on or about February 10, 1973?

A There would be no way for me to make such observations. There would be no reason to.

Q Did you observe that there were no tank trucks going in and out of the plant at and after February 10, 1973?

THE COURT: Sustained. No foundation.

Do you know whether or not there were tank trucks going in or out?

THE WITNESS: I would have no reason to observe tank trucks.

Q Did there come a time when you observed that the Monticello Gas & Oil plant was shut down?

A Yes. I believe so.

Q When did you observe it to be shut down?

A Sometime in the summer of 1973.

Q Did you observe the plant to be shut down at an earlier date?

A No.

Q Mrs. Huss, you were not always in residence at

the Doralee premises, were you?

A Not always, no.

Q You have a home in Florida where you go in the wintertime; is that correct?

A For a few weeks now and then.

Q And you also have a home in New York City where you go from time to time?

A That's right.

MR. COLIN: Would your Honor indulge me for a brief moment?

THE COURT: Surely.

(Pause)

Q I will read at page 47 of your sworn deposition in this case --

THE COURT: What is the purpose of this?

MR. COLIN: In relation to her fixation --

THE COURT: Just a minute. Is this in contradiction or alleged contradiction or something she just said?

MR. COLIN: Yes.

THE COURT: You have been inquiring where she lived elsewhere?

MR. COLIN: It is about the question before that.

THE COURT: Let me see what it is that you propose to read.

(Pause)

MR. ORSECK: I would consent that it be read, your Honor.

THE COURT: Very good.

Q I am going to read from your sworn deposition in this case, page 47, and then I will ask you a question.

MR. ORSECK: I would ask that you read from the page before, one question, if you would be kind enough, two questions.

THE COURT: Show him which ones.

MR. ORSECK: The last two before he wants to read.

MR. COLIN: I will take it under consideration.

MR. ORSECK: I don't care if you do or not.

MR. COLIN: I will read what Mr. Orseck suggested that I read:

"Q Is that plant now in operation?

"A No.

"Q When did it cease to operate?

"A About March of '73. March or April.

"Q Do you recall the date when, according to your observation, the plant first ceased to be in operation?

"A To the best of my recollection I would say possibly sometime at the end of March."

Q My question to you, Mrs. Huss, is: Did you give those answers to those questions under oath in the deposition?

A Yes, of course.

Q Do you believe that your testimony given at that time was correct?

A You didn't ask that question today. You asked when I thought operations stopped and to me that represents when the tanks were removed and so forth. That was at a much later date.

MR. COLIN: I move to strike the witness' volunteered response.

THE COURT: Denied.

Q Was your testimony given on your deposition correct?

A Yes.

MR. ORSECK: That question was just asked and answered.

Q Mrs. Huss, did you observe the surface of the ground at the Monticello Gas & Oil plant being bulldozed and removed?

A Yes. Some of it. Some of the operations.

Q These photos that were put in evidence as Plaintiff's Exhibits 29 and 32 are photos that show the premises being bulldozed; is that correct?

A Yes.

Q Do you remember when that was done?

A Sometime during the summer of '73.

Q Did you observe that the earth was removed from a depth of one to three feet from the surface of the premises?

A I could not answer just how many feet or inches or whatever was removed.

Q But a substantial amount of the top surfa-e was removed to your observation?

A I don't know.

Q Did you see the earth being carted away after it was dug up?

A No.

Q Did you see any earth being carted in to replace it?

A I know some work was done. I cannot define just what was done. I have my own business to attend to.

Q You saw the tanks and the equipment removed from the premises, didn't you?

A Yes.

Q Meaning the Monticello Gas & Oil premises?

A Meaning the Cities Service premises.

MR. COLIN: I move to strike.

THE COURT: It is a geographical location we are

talking about. Ownership is not involved. Operation is not involved. The answer may stand.

Q After the digging up of the surface and after the removal of the tanks and equipment, there was in effect nothing there, is that correct, except the land itself?

A And a building.

Q Which was not occupied; is that correct?

A I don't know that.

Q Have you seen any evidence of use of those premises since the tanks were removed and the earth was dug up?

A I have not particularly noticed.

Q Mrs. Huss, in your prior lawsuit you claimed damage from the seepage of oil from the Cold Spring Road distributing plant; is that right?

A If you are asking for the names of the defendants --

Q I am not asking for the names of the defendants. Perhaps you didn't hear the question. If you want I will have the reporter read it to you.

THE COURT: Read it back.

(Question read.)

A Yes.

Q You claimed damages for the period that you owned

the Doralee property commencing in 1965 on?

A Not for the entire period, no.

Q For what period did you claim damages?

A I believe it was four years temporary relief for loss of rentals as a result of the oil pollution, up to April of '72.

Q Up to April of '72?

A Yes.

Q You settled that action at that time for $12,500, right?

MR. ORSECK: Your Honor, the characterization in the question, the subject matter is true but the characterization is bad because Cities Service settled it also. I object to the form of the question.

THE COURT: I will allow it.

MR. COLIN: I think there has been excessive interruption by Mr. Orseck of my examination.

THE COURT: I overrule the objection.

A Yes.

Q You started this case on February28, 1973; is that correct?

A I would have to refer to the papers as to the exact date.

MR. ORSECK: It is a matter of record.

MR. COLIN: I agree to it.

MR. ORSECK: If it was not that date it was two or three days after.

THE COURT: February 27, '73, all right.

Q Since we have agreed on it, Mrs. Huss, you agree therefore that this action was started ten months after the settlement of the prior action; is that correct?

A Yes.

Q In the prior action you released everything before April 25, 1972?

MR. ORSECK: I object to the question.

THE COURT: I sustain the objection on the grounds of form.

You have the various instruments in evidence which are the best evidence.

MR. COLIN: It was just a preliminary question. There is no question, I don't think --

MR. ORSECK: Then why ask the question of the witness.

THE COURT: Go on to the next question, please.

Q In this action, the one we are trying now, your damage claim is for oil seepage from and after April 25, 1972; is that correct?

A Well, it is for oil contained in my land and

grounds plus the additional gross spillage that occurred after the April 25 date, 1973.

Q Do you agree, Mrs. Huss, that this action asserts the same claim by Doralee as was asserted by Doralee in the prior action except for the difference in the time period?

MR. ORSECK: The complaints speak for themselves. I would say that would be the best evidence. He didn't ask her what her understanding was, he asked her what it is. What it is is what the complaint says.

THE COURT: I think the question calls for her understanding. I will overrule the objection.

THE WITNESS: My understanding regarding this action now?

THE COURT: Yes. Mr. Colin asked whether this is in effect the same claim but for a different time period.

THE WITNESS: It is for very much more damages that have occurred to my property since. The $12,500 only represented loss of rental.

MR. COLIN: I object to that, your Honor.

MR. ORSECK: It is her understanding.

THE COURT: You asked her what her understanding was of the two claims.

MR. COLIN: I did not ask her that question. My

question, and your Honor paraphrased it very clearly, was whether the present suit except for the different in time is for the same claim as was made in the prior suit.

THE COURT: The witness is shaking her head. The answer to that is no.

Q Mrs. Huss, in the prior suit you claimed damage from oil spillage, did you not?

A Yes.

Q In the present suit you claim damage from oil spillage, don't you?

A Yes.

Q In the present suit you claim damage for the period from April 25, 1972 until you filed your complaint in February, 1973; is that correct?

MR. OPSECK: Bad question.

(Question read.)

THE COURT: Sustained. The form is bad.

MR. COLIN: May I approach the bench, your Honor?

THE COURT: We will take our mid-morning recess at this point, ladies and gentlemen.

(Jury leaves the courtroom.)

THE COURT: That question, frankly, was a confusing kind of question.

MR. COLIN: I was going to ask you what was wrong with the form. I could not see it.

THE COURT: It was the kind of question, in thinking about it, I would have to spend quite a little bit of time trying to establish-- I could get to what you wanted, but I would have to spend time figuring out what its meets and bounds were. I felt that it being put to a lay witness was in improper form. There is too much in it. I felt that question was poor in form for this kind of witness.

MR. COLIN: May I ask your Honor, respectfully, how you would suggest I ask her to explain--

THE COURT: Off the record.

(Discussion off the record.)

(Recess.)

MR. COLIN: Your Honor, I have been doing a good deal of soul searching in connection with this case, and I feel, sir, that in order to protect the interest that I represent I must place on the record a motion for mistrial. I feel that your Honor's manner of castigating me in the presence of the jury for certain questions or lines of certain questioning, and your Honor's manner generally in dealing with me as compared to dealing with plaintiff's counsel has been

such as, in my opinion, to seriously prejudice the interest of the defendant before this jury. As I say, sir, I make this motion after a good deal of reflection, and I make it with the utmost respect for the Court.

I am aware that your Honor and all of us here are subject to reactions of the mind and of the spirit. I don't in any way lack awareness of that, but I do think that the effect of the matters to which I refer on the jury has been such as to prejudice our ability to get a fair evaluation.

THE COURT: I am sorry you feel that way. We have had our differences on a couple of occasions.

Would you like me to make a statement to the jury that nothing between the Court and counsel of any kind -- in fact, I think I will do that.

MR. COLIN: That, your Honor, would do it in the normal course of events. I do not think it can be curative.

THE COURT: I want to quickly say I will deny the motion. I do not see that there is anything here that has in any way affected the jury's ability to decide this case on the evidence. Given the fact that you have felt compelled to make this motion, I will make a statement to the jury at this point.

I have said things to all counsel during the course of this trial. I have told Mr. Orseck, by word or motion, to sit down. I have told him I didn't want to hear him when he urged things on me.

I must confess, as we discussed earlier, particularly after yesterday when Mrs. Huss had used the word "form" again and again and again, and said she did not know it was a release, and again this morning where she said she did not know it was a release, that, I felt was unfair examination on your part to continually refer to that paper as a release. You referred to it in three or four questions in a row as a release. "There is something put on this release," and she didn't understand what you were talking about. I concluded, intentionally or otherwise, the suggestion was being given to the jury that we were dealing with a release and, therefore, she was being evasive or falsifying testimony before us in using the word "form."

It was finally after quite a bit of use of that, that I sustained an objection, and then you continued to want to argue with me about that in the jury's presence to justify why you had been using the word "release." I did not want that colloquy in the jury's presence because it is not you who are testifying, it is Mrs. Huss who is testifying. You continued to debate that with me in the jury's presence. It

was at that point you made an application and you asked me if you could be heard, and I said no because I didn't want that heard in the jury's presence.

That is, I really believe, the crux of the whole problem on one score.

The other crux of our problem has to do with the $70,000 figure that she purchased it for. There I feel you were less than sensitive or less than aware of the scope of the ruling I made yesterday. All I d that point was to excuse the jury so that we could, in comfort, discuss how we could resolve that problem.

I do not believe there is any real basis for a mistrial.

I have had occasion to in some way speak to all the counsel in regard to, "I don't need to hear this or that. Please go on to something else. Your motion is denied."

I will make a statement to the jury at this moment.

We are trying the case on the evidence and the evidence alone, and that consists of testimony ofthe witnesses on the stand; the jury is to consider that and that alone, and the exhibits that are properly before them and nothing else to determine the outcome of this case.

Bring the jury in.

MR. COLIN: May we go off the record, your Honor?

THE COURT: Off the record.

(Discussion off the record.)

(Jury in box.)

THE COURT: Ladies and gentlemen, before we resume, I said to you at the very outset of this trial and I will say this again: You are triers of the fact here. This case is to be tried solely only upon the evidence which you hear in this case which consists of the testimony you hear from the stand and exhibits that are admitted for your consideration. You are to decide it on that evidence or the lack of evidence, as the case may be.

During the course of the trial I have on occasion felt it appropriate to speak to one counsel or another, and engage in dialogue with one counsel or another, and nothing I have said to any counsel or nothing that any counsel says to me is evidence in this case. It is not to be considered by you as evidence in this case. The case is tried on the evidence and evidence alone. Keep that in mind. We are trying this case on the merits of the evidence that is being received and nothing else.

You may proceed.

BY MR. COLIN:

Q Mrs. Huss, in your prior case it was claimed by Doralee that oil was spilled on the Monticello Gas & Oil premises and ran through various ditches, culverts, and other means to your premises; is that correct?

MR. ORSECK: I object to certain words in the question but not to the subject matter.

(Question read.)

THE COURT: Overruled. You may answer.

A On the premises of Cities Service --

MR. COLIN: Your Honor --

THE COURT: Forget how you name the premises. This is this oil depot across the way, right?

MR. COLIN: I think this is a yes or no type question.

MR. ORSECK: I would respectfully suggest your Honor instruct the jury, regardless of how the question is framed, we are dealing with that plant and, therefore, I will object if Mr. Colin chooses to call it Monticello Gas & Oil so long as your Honor instructs the jury ultimately it is their determination who owned it and when.

THE COURT: Those are questions for you to decide. We are talking about a geographical location, a facility.

(Question read.)

THE WITNESS: Monticello is worded there to --

THE COURT: Don't worry about that.

THE WITNESS: Yes.

Q In your prior case you also claimed that the soil of that oil plant became saturated with oil and that that oil seeped through the ground and by various means reached the Doralee property; is that right?

A The soil?

THE COURT: The soil became saturated.

Q And it seeped through the ground and got to the Doralee premises.

A The soil didn't seep. The oil.

Q That was one of your claims?

A Yes.

Q Those two claims represent what you asserted in the former suit to be the reason for the damage that you claimed; is that right?

A Yes.

Q In this present suit you claim that oil was spilled on the Monticello Gas & Oil premises and ran off and by various means reached the Doralee property.

MR. GRUBBS: I object to the form as being repeated.

A Part of the claim contains that.

Q The remainder of the claim is that the oil which saturated the ground at those premises seeped through and finally reached the Doralee premises.

A That happened but that is not the remainder of the claim.

Q What else is the remainder of the claim?

A Punitive damages.

Q I am talking about the events on which your claim is based.

MR. ORSECK: Regardless of what the cross examiner is asking about, the answer is responsive.

THE COURT: Next question.

Q The circumstances for which you claim damage are reflected in the questions that I put to you and the answers you gave to me; is that correct?

MR. ORSECK: I object to the form.

THE COURT: Sustained.

Q Insofar as damage from oil reaching your premises is concerned, did your two actions claim that the oil reached the Doralee premises by being spilled on the oil plant, running off, or by saturating the ground and seeping underground to your premises?

MR. ORSECK: I object on form.

Q That is your claim?

MR. ORSECK: I object to the form.

THE COURT: Come to the side bar.

(At the side bar.)

(Continued on next page.)

THE COURT: What is it you are intending to get here? I have felt it was inappropriate to ask a lay person what was the nature of that type of aspect of the claim. A lawyer prepares a pleading, expert witnesses testify how things happen. All that this lady knows, if I can speculate in this regard, is that there is an oil spillage across the way.

MR. ORSECK: She is entitled to something.

MR. COLIN: That's all I asked.

THE COURT: You are trying to confine her to it seeping through the ground or coming through the culvert.

MR. COLIN: No.

THE COURT: That's the thrust of what I heard.

MR. COLIN: I am trying to establish that in the first case she had a claim and in the second case she had a claim, and it is the same claim based on the same circumstances.

THE COURT: That's not what you are asking.

MR. COLIN: I believe I was asking that.

THE COURT: I didn't get that flavor. You were trying to pin her down by the oil going down the culvert or seeping through the ground and limiting it to her.

MR. ORSECK: Since we are at the side bar, I warn counsel it is the plaintiff's position that this is

opening the door as to the difference between the two cases. I intend on redirect to show that in this complaint we are talking about criminal violations --

THE COURT: You may or may not be entitled to that. If that door has been opened, it has been opened already. You don't have to argue that.

#17 MR. COLIN: The only thing I am trying to get to -- and I know from examining this witness in the past how careful I must be -- is whether her claim in this case is the same as the claim on the other case as to the facts.

MR. ORSECK: We will stipulate that both actions had to do with oil coming from that plant.

THE COURT: They will agree with you.

MR. COLIN: That's all I am trying to get.

MR. ORSECK: I will stand up and stipulate.

(Continued on next page.)

(In open court.)

Q Mrs. Huss, do you agree that in both the former action and this action, your claims are based on the allegation that oil in some way got from the Cold Spring oil plant to the Doralee premises?

A This claim represents only a part of that --

MR. ORSECK: I move that that be stricken. The question was a very simple one. The question was: Did the old case and this new case both have to do with oil spillage.

A Yes.

Q Mrs. Huss, you have on the Doralee premises two bodies of water; is that correct?

A Yes.

Q One being quite small and the other larger; is that correct?

A Yes.

Q Does the small pond dry up every summer?

A No.

Q Does it remain full of water every summer?

A Not full but there is water in it.

Q Do you say that it does not dry up any summer?

A No.

MR. ORSECK: I object to the form of that.

THE COURT: I sustain that as to form.

Q Does it dry up any summer?

A No.

Q I read from page 179:

"Q During the summer season you had some water in the pond, didn't you?

"A Some. Very little.

"Q Well, two-thirds of it or does it dry up?

"A It dries up."

Did you give those answers to those questions on your sworn deposition in this case?

MR. ORSECK: On what date?

MR. COLIN: September 25, 1973.

MR. ORSECK: Let the record indicate that these questions deal with only the previous summer and not generally.

THE COURT: You may bring out matters on redirect that you think bear on this.

MR. ORSECK: Yes, your Honor.

Q Mrs. Huss, at the time you purchased the Doralee property there was a swimming pool on the premises, was there not?

A Yes.

Q You didn't install it after you bought the property?

A No, sir.

Q Do you have with you, Mrs. Huss, any of your leases for the 1976 or 1975 season?

MR. ORSECK: Your Honor, I have stated on this record in the presence of the jury, yesterday, that these leases, copies of all have been given to Mr. Colin. I also stated that they were here on this table.

THE COURT: Let's get them out.

MR. COLIN: It is not a fact that I was given any leases for 1975 and 1976. I think it would be better if we had fewer remarks made of this nature in the presence of the jury where issues --

THE COURT: I agree we should have a minimum of all remarks in the presence of the jury.

MR. ORSECK: That's true what he said and the reason is at the time he asked for them was in '74.

THE COURT: Let's produce them.

MR. ORSECK: We don't have '76 here.

A No, we don't.

MR. COLIN: During the recess I would ask you give me '75 and '74, and I would, sir, since Mr. Edison testified with respect to '76 that you also furnish me that.

MR. ORSECK: If you had asked me yesterday they would have been here today. You will have every document you

want.

Your Honor, Mr. Colin has photographs. As long as he represents that they have to do with either of the two premises at any time in history, I consent to their admission and it will save time.

MR. COLIN: These are photographs marked in evidence in the prior case. If you will consent to their being admitted I will offer them. I am offering only those that were received in evidence in the prior case.

MR. ORSECK: My offer is unconditional.

THE COURT: They will be received.

Please mark them.

Do you have any objection, Mr. Grubbs?

MR. GRUBBS: No objection, your Honor.

MR. COLIN: I ask that this be marked in evidence.

xxx (Defendant's Exhibits Q through V received in evidence.)

Q Mrs. Huss, I show you Defendant's Exhibit V and ask you whether that is a representation of conditions in the vicinity of the Doralee property.

A This is the Town Barn.

Q The Town Barn?

A Yes.

Q That's in the vicinity of the Doralee property?

A It is on Cold Spring Road.

MR. ORSECK: May the record indicate that the photos admitted in evidence by consent were all taken in April of '72.

THE COURT: There is no question about that.

MR. COLIN: I notice that they have a date notation on the reverse. What Mr. Orseck has consists of that. I didn't make nor do I know who made the notations.

MR. ORSECK: Your Honor, not to interrupt but by logic, they were introduced in April in '72 so that may the record indicate as a matter of logic they had to be taken prior to that time.

MR. COLIN: I stipulated that I know of nothing that says otherwise.

Q I show you Exhibit U and ask you whether that shows an entranceway to the Doralee premises taken at or about April, 1972.

A It is an entranceway that is not being used.

Q It is part of your premises, is it not?

A It is the entrance on the road.

MR. COLIN: I think, your Honor, it might be well to show these to the jury while I am in the process of introducing them.

THE COURT: All right.

(Pause)

Q I show you Defendant's Exhibit T in evidence and I ask whether that's a gateway to the Doralee premises.

MR. ORSECK: Is that one of the documents I stipulated to?

MR. COLIN: Yes. These are all the same batch.

A This is the same area. It is the Waverly Avenue area.

Q Is it an entranceway to the Doralee premises?

A (Pause) It may have been briefly while it was being repaired at one time, yes. It does not look anything like this now.

Q Mrs. Huss, are the structures shown behind the entrance Doralee bungalows?

A Yes, they are.

Q I show you Defendant's Exhibit S in evidence and I ask you whether that's a picture of another entrance to the Doralee premises.

A Yes.

Q Mrs. Huss, on that exhibit you have a sign outside the entrance, do you not?

A Yes.

Q Among other things the sign has the word "fishing" on it?

A Yes.

Q You also have a gn on the other entrance shown on U in evidence where the word "fishing" also appears?

A Yes, sir. Not very legible but it does.

MR. COLIN: I move to strike the latter part of the answer.

THE COURT: Denied

Q I show you Defendant's Exhibit R and ask you whether that is a photo of one of the Doralee cottages, particularly the entranceway.

A No, it is not.

Q That is not a Doralee cottage?

A No.

Q Mrs. Huss, I read to you from the transcript of the former trial at page 133:

"Q I now show you Defendant's MGO Exhibit E-30 for identification and ask you whether or not this is a photograph of one of the bungalows upon your premises as it now exists.

"A It is not a bungalow. This is a winter house which is in the process of being winterized right now. It is being worked on right now.

"Q Then it is an accurate depiction, is it not?

"A Of the building?

"Q Yes.

"A Yes."

I ask you, Mrs. Huss, after hearing that testimony, whether you agree that Exhibit R depicts the exterior of one of the buildings on the Doralee property.

MR. ORSECK: The form is really atrocious.

A You asked me if it was a cottage and I responded that it was not.

What you read does depict what is contained in this picture.

THE COURT: Come to the side bar.

(At the side bar.)

(Continued on the next page.)

THE COURT: Mr. Colin, there has been more of this than I would wish. You asked this woman if this was a cottage. She said no because it was not a cottage. You then proceed to impeach her on the basis that it is not a cottage, it is a building, a winterized building. I regard that as essentially unfair.

MR. COLIN: It was not intended to be.

THE COURT: I interpreted it as being unfair because your last question sought to bring the thing under the rubric of "building."

MR. COLIN: A cottage to me is any one of the structures there.

THE COURT: That's your definition. We have had this before. We had this with the toilet area, the toilets backing up, with the effort being made to impeach on the theory that her septic tanks were backing up out into the septic field. That impeachment failed. There was no basis for it in the first place.

This impeachment, allegedly so, is on the theory that she denied it is a cottage; but it is not, it is a winterized building. When you are thwarted in that you come in and say it is a building.

MR. COLIN: The jury can hear you.

THE COURT: I don't think they can because I

1 am speaking away from them.

2 In any event, I don't want any more of that.

3 MR. COLIN: I think you are suggesting that I

4 am practicing some kind of sharpness and I want to tell you,

5 sir, I have been practicing law for forty-five years and I

6 don't practice that sharply. I practice ethically and

7 respectfully.

8 THE COURT: I am distressed when you use the

9 word "cottage" in your question and she says no, it is not

10 a cottage, and you then say it is a building.

11 The word "cottage" --

12 MR. COLIN: An honest answer would have been

13 it is not a Doralee cottage but a building.

14 THE COURT: You didn't ask her that. It is not

15 one of her cottages. I am not saying anything here impugning

16 your integrity.

17 MR. COLIN: You are suggesting it.

18 THE COURT: You are using language loosely in

19 an effort to impeach her.

20 MR. COLIN: I think almost anyone would call one

21 of those little structures a cottage. It is a commonplace

22 word.

23 THE COURT: If you have a winterized house in

24 that county --

25

MR. COLIN: I looked at the picture.

THE COURT: But take your answer. In order to make the impeachment you turn the word "cottage" into "building."

MR. COLIN: I will straighten it out as you think best.

THE COURT: I will not do a thing. I want to express --

MR. COLIN: I feel very keenly about the fact that your Honor has somehow suggested that you entertain a belief that I am some kind of sharp, sleazy type of lawyer, and I want to tell you, sir, that in my own self-evaluation that is not consistent with the facts.

THE COURT: The efforts to impeach her have at times gone way beyond what the record would support. I am suggesting that.

(In open court.)

MR. COLIN: Your Honor, I think that was the last of the photographic exhibits that were marked at the former trial.

I would like to show this last one to the jury.

THE COURT: You are showing that to the jury as being a Doralee building that is being winterized.

MR. COLIN: I only know that I read from the

record at that time the witness's statement that it was a building being winterized. I don't know the facts.

MR. ORSECK: We don't have any contrary proof.

MR. COLIN: It is not in question as far as I am concerned.

(Pause.)

MR. COLIN: The jury has seen all of these photos. I would suggest that this would be an appropriate time in my line of examination to suspend.

THE COURT: We will be in recess until two o'clock.

(Luncheon recess.)

- - -

2:10 P.M.

THE COURT: Over the lunch hour Mr. Golden went through the opening and discovered that you are correct, Mr. Colin.

Off the record.

(Discussion off the record.)

THE COURT: Obviously Mr. Colin's recollection of this was better than anybody else's recollection in the room. I didn't remember it. It is an aside in the flow of words, "Sometime after Doralee bought the property -- and they paid approximately $70,000 for the property -- they discovered that its neighbor across the street," and so forth.

So you are correct and your memory is better than that of any of the rest of us.

Given that, I think I would permit you to inquire.

MR. COLIN: Thank you, sir.

THE COURT: I remember I cut you off when you got to that before and called for a side bar and sustained an objection to it. Now, given the state of the record, I think you should be permitted to inquire about it.

(Jury in box.)

THE COURT: Mr. Colin, in the presence of the

jury, called to my attention the fact that the figure of $70,000 being paid for the property was mentioned by plaintiff's counsel in the opening. That being called to my attention, I reversed myself on the earlier ruling where I excluded that. So you may inquire, if you so desire.

(Continued on next page.)

D O R A H U S S , resumed.

CONTINUED CROSS EXAMINATION

BY MR. COLIN:

Q Did you pay $70,000 when you purchased the premises?

A Yes.

Q That was in 1965?

A Yes.

Q Did you make a down payment of $10,000 against the $70,000 purchase price?

MR. ORSECK: I would object on relevancy.

THE COURT: I do not see that that has any relevancy. I sustain it.

Q Did you deliver a mortgage of $60,000 in connection with the purchase?

THE COURT: I sustain the objection.

Q Mrs. Huss, has your income from tenants increased since the year of purchase in 1965?

A Very little.

Q Was your income from tenants in 1965 approximately $14,000?

A That sounds about it.

Q Was your income from tenants in 1973, $21,000 plus?

A I don't believe so.

THE COURT: I take it you are talking about gross rentals?

MR. COLIN: Yes.

Q Do you know that your counsel furnished me with the leases covering the rentals made by you?

A Yes.

Q For the record I will state that whatever I am questioning you about is based on figures compiled from data that your counsel furnished me.

THE COURT: That is a representation at this point.

Q Do you have an idea of what was your gross receipts from tenants in 1973?

A If you are referring to the summer rental, yes.

Q I am referring to the amount of money you took in from tenants in 1973, the total amount.

MR. ORSECK: Your Honor --

THE COURT: Ask her if she has a present recollection of what that is.

A Inclusive of winter rental it could have been

that amount.

Q Do you recognize the name Unterberg?

A Yes, sir.

Q Was Unterberg one of your tenants?

A Yes.

Q Was Mr. Unterberg one of your tenants in the first season, 1965, that you owned this property?

A I don't believe so.

Q If your lease record for the year 1965 shows Unterberg to be a tenant, you would not question it, would you?

MR. ORSECK: I don't question this subject matter at all but it seems to me unless counsel is trying to conduct a memory test it would have validity. We have no objection to those leases which speak for themselves, really, common sense says she can't remember '65 --

THE COURT: I understand.

Overruled.

Q Was Mr. Unterberg a tenant of yours in '65, '66, '67, '68, '69, '70, '71, '72 and '73, Mrs. Huss?

A Not in '65. Beginning with '66 I believe so. And not in '73, I don't think.

Q You are willing to accept whatever the lease records show?

A Yes.

Q Was Mr. Levine or the Levine family a tenant of yours in '65, '66, '67, '68, '69, '70, '71, '72 and '73?

A Not for the entire seasons.

Q During some portion of each of those seasons did they rent from you?

A She, yes.

Q Did the D'Amato's rent from you for many years?

A No. Not many.

Q Many seasons?

A Some seasons, yes.

Q Did they rent consecutively '65, '66, '67, '68, '69, '70, '71, '72?

A I don't believe they were there in '72.

Q But you would accept what the record shows?

A Yes.

Q Did you have a substantial number of leases of your rental units made to persons who had rented from you in prior periods?

A Would you repeat the question, please?

(Question read.)

A What is the reference of prior periods?

THE COURT: Rephrase the question.

MR. COLIN: I will try to clarify it, yes.

Q Were many of your renters repeaters?

A Yes.

Q Were there more of your units rented to repeaters over the period of time from 1965 to 1973 than were rented to persons who came for only one season?

A To the best of my knowledge I think there was about a 50 or 60 percent turnover.

Q Do you mean by that that there were 50 or 60 percent repeaters?

A Yes. Possibly.

Q Did the persons who came to you as repeaters occupying your premises one season after having occupied premises at Doralee in a prior season, did any of those persons indicate their satisfaction with the facilities they rented from you?

A Or dissatisfaction, yes.

Q Did any of them indicate their satisfaction?

A In a limited fashion.

Q Mrs. Huss, did you negotiate a substantial proportion of the leases or rental arrangements for Doralee?

A Yes.

Q When you spoke to someone about renting them a unit in Doralee, you indicated to them, did you not, what your rental charge was; is that correct?

A Yes. What I tried to get, yes.

Q Did you in the case of the repeaters inform the repeater that the rent for the next season would be higher than the rent for the season just completed?

A I tried to.

Q You did, did you not?

A I tried to tell them that I would like to get a little more money.

Q You did get more money from your renters as the years went on?

A No, I didn't.

MR. ORSECK: Your Honor, I think since we are talking from 1965 to 1976 we should have a time frame.

THE COURT: You can inquire on redirect. Make a note of it.

Q Mrs. Huss, when was the last time you saw on your Doralee premises what you believe to be oil?

A This past year, now.

Q Can you fix a date?

A December. The beginning of December.

Q December of 1976?

A Yes.

Q When before then did you see what you believed to be oil on your premises?

A During the summer, fall, spring of '76.

Q Where did you see it in December?

A On the lake, on the perimeter.

Q On the perimeter of the lake?

A Yes.

Q What did it look like?

A On the lake it looked like a rainbow color.

Q We are talking of what you saw in December.

A Yes.

Q Wasn't the lake frozen into ice in December?

A No.

Q The lake was not frozen solid in December of '76?

MR. ORSECK: She just said it was not.

THE COURT: She said it was not.

Q You saw the rainbow on the perimeter?

A On the water.

Q Has it usually been the fact that your lakes freeze solid at the commencement of the winter season and remain frozen solid until springtime?

A No.

MR. ORSECK: How can anybody give an intelligible answer unless we know what date he is talking about. I object to the form of the question.

THE COURT: He said "commencement of the winter

season." Isn't it December 21?

MR. ORSECK: I understand that. Somebody else may understand it to be later.

THE COURT: Is that what you understood us to be talking about?

THE WITNESS: There are thaws. There is early winter. It freezes. There is ice that breaks. There is a lot of water.

Q What you saw in December of 1976 was what you call a rainbow?

A A rainbow color.

Q On the water?

A Yes.

Q Did you do anything beyond looking at it to ascertain what that rainbow might be?

A What I did was trv to get the photographer very quickly to take a snapshot of it.

Q Did you get him?

A Yes.

Q One of those snapshots is in evidence?

A Yes.

Q In the fall of 1976 where do you say you saw evidence of oil?

A Where?

Q Yes.

A The same areas. The lake and the preserve area, the swamp area.

Q You saw it in the swamp area and the lake. When we talk about the lake we mean the larger --

A Both lakes.

Q You saw it in both lakes and not just the larger one?

A That's right.

Q In the summer of '76 where did you see it?

A Same locations.

Q In the swamp and in the two bodies of water on your property?

A Yes.

Q Was the small pond dried up that summer?

A I could explain that.

MR. ORSECK: Answer the question.

Q Was it all dried up that summer?

MR. ORSECK: We are talking about '76?

A I can't answer it with a yes or no.

Q Was the small pond substantially without water in the summer of '76?

A There is always water but it was not full.

Q Was there a small, a very small amount of water

in it?

A I would say anywhere from half to two-thirds water, possibly one-third's full.

Q Do you know of your own knowledge where whatever you saw and what you believe to be oil came from at those times?

A Where it came from? It came --

Q Do you know of your own knowledge? That's my question.

A Yes.

Q How did you acquire the knowledge of where it came from?

A By looking in the areas that I always looked.

Q Where did you always look?

A In the preserve area.

Q In the swamp area?

A Yes.

Q Did you determine that it came from the swamp area?

A Yes. It would have to come from there.

Q The swamp area is a low point that receives what we would call the liquid flow from the surrounding area, isn't it?

MR. ORSECK: Objection. I ask the Court to

instruct the jury to disregard the question.

THE COURT: I will sustain an objection to the form of the question, when you say it receives this and that from the surrounding area. There is no foundation for that at all. I will sustain the objection.

Q The swamp is lower than the surrounding area; isn't it?

A It covers quite a large area, that preserve area.

Q You have been in and around the area of the swamp, have you not?

A Yes.

Q The area surrounding the swamp is of a higher elevation than the swamp, isn't it?

A I can't be sure of that. As I said, it covers a number of acres.

Q Were you in the courtroom when Plaintiff's Exhibit 1 was received in evidence and there was some discussion relative to the elevation of various areas in this vicinity?

A Yes.

Q Look at the swamp area as it is described --

A I can't read maps. It does not mean a thing to me.

Q I will not ask you to do what you cannot do.

The swamp area is an area that has liquid underfoot; is that right?

A Yes.

Q Does that liquid come from other places to the swamp?

MR. ORSECK: Your Honor, unless it is a test of knowledge of environmental science or geography, I would object. There are so many witnesses through which this information can be obtained authoritatively. I guess he has the right to ask for anything he wants, but I also respectfully remind the Court that cross examination may be limited in discretion as long as it is not to the prejudice.

THE COURT: At this time I will let him continue.

A I know there is a fresh running spring that feeds the swamp, yes.

Q Mrs. Huss, is the swamp also receiving water from a culvert along Cold Spring Road?

A It is receiving a direct flow from the ditch at the premises.

Q Does the swamp also receive whatever water runs off the higher areas around it?

A The mountains? Yes. I believe so.

Q Does it receive anything, any liquid that runs off the area around it?

A Not any liquid that runs off from any place, no.

Q The liquid that runs off from the higher areas surrounding the swamp?

A I would assume that the mountain, rain and snow and so forth, yes.

Q Did you try to trace beyond the swamp to see where this oily material came from?

A New York State did this for me.

Q I am asking you in December, 1976 or fall of 1976 or summer of 1976 whether you endeavored to trace beyond the swamp the source of what you thought was an oily substance.

MR. ORSECK: The question was asked and answered. This one is objectionable in form for a good number of reasons.

THE COURT: I will sustain the objection and permit the question if she was able to trace the source of the oil.

Q Did you try to trace the oil from a source prior to its coming into the swamp?

A At that time I was only concerned with the fact that there still existed oil on my lakes and land.

Q What is your answer to the last question?

A I didn't look any further than that.

Q In December, 1976 and in the fall of 1976, the summer and spring of 1976, there was not an oil plant at the location formerly occupied by Monticello Gas & Oil, was there?

A No.

Q The whole year 1976 there was not any oil plant there?

A No.

Q And in '75 there was not any oil plant there, correct?

A Correct.

Q And '74 there was not any oil plant there, correct?

A Correct.

Q And for not less than half of 1973 there was not any oil plant there, correct?

A Right.

Q During this time when there was not any oil plant there you say you still were observing indications of oil on your premises; is that right?

A On the rocks.

Q Do you still have septic tanks on the Doralee premises?

A Yes. We have some.

MR. COLIN: That is all I have at this time, your Honor.

THE COURT: Mr. Grubbs.

When you say "at this time", what does that mean?

MR. COLIN: That was just a phrase to end my sentence, your Honor.

THE COURT: Very good.

CROSS EXAMINATION

BY MR. GRUBBS:

Q I understand you are president of Doralee Corporation.

A Yes.

Q You have been since it was incorporated; is that correct?

A Yes.

Q You also manage the Doralee properties along Cold Spring Road, do you not?

A Yes.

Q In connection with your management you are in charge of the purchases, and by that I mean if you do not purchase something directly it has to be approved by you before you make the purchase?

A To some extent.

Q How about if any work is done on the premises,

doesn't it have to first been authorized by you?

A Not always, no.

Q Is there any other officer of the corporation that does that?

A No.

Q Is there any other officer of the corporation?

A No, sir.

Q When it comes to leasing the various units you have, you are in charge of that too, are you not?

A For the most part.

Q You are the one who negotiates the leases, are you not?

A To a great extent, yes.

Q When there was this sewerage problem that was discussed earlier, you contacted various units of government in connection with it; isn't that true?

A Yes.

Q If there were any problems with regard to taxes, you were the one who contacted the various tax units to take care of that; isn't that true?

A At times myself, yes.

Q Before you became president of Doralee Corporation, were you in some business office?

A I was employed as an office worker.

Q It was a business office, was it not?

A I did medical transcription for a doctor.

Q Were you a secretary?

A I did work of that nature.

Q In connection with your three residences, do you supervise their maintenance?

MR. ORSECK: I think what he is trying to do is say that she is a rich woman --

MR. GRUBBS: No, no.

THE COURT: I am curious as to the relevance of this. I would like to hear it at the side bar.

(At the side bar.)

(Continued on next page.)

MR. GRUBBS: I want to show she is a business woman who has been dealing with legal documents and she has experience. She is not a woman who has no experience. When she executes an instrument she knows what she is doing.

I don't want any loud discussion in front of the witness.

THE COURT: You are right. You can inquire, but I think you ought to focus it a little, however.

(Continued on next page.)

(In open court.)

Q In connection with your management of the Doralee Estates over the preceding ten or eleven years, did you also check out any state or local legislation that concerned you?

A If I had need to I may have.

Q Would it be fair to say that you were the business executive that supervised and managed Doralee Estates since its inception?

MR. ORSECK: I don't like the characterization in the question.

A Yes.

MR. ORSECK: She ran the affairs. There is no question about it.

THE COURT: I think the jury understands.

Proceed.

Q When the Doralee Corporation purchased the land, you were the one who executed the documents? You signed the documents?

A Yes.

Q And when Doralee obtained sewer rights, did you also sign whatever documents were necessary in that regard?

A Whatever particular documents I was required to sign I would sign, yes.

Q In connection with these various business transactions which you signed as president of Doralee, Incorporated, did you regard it important to read a document before you signed it?

MR. ORSECK: Your Honor, this is --

THE COURT: I will sustain that in that generalized abstract sort of form.

Q When the corporation was incorporated, did you sign any papers?

MR. ORSECK: Your Honor, this is irrelevant.

THE COURT: Overruled.

Q Did you execute any papers in connection with the incorporation of Doralee Estates?

A I would imagine so.

Q Before you signed the papers didn't you read them over to see what you were signing?

A To some extent I probably did.

Q Before you agreed to purchase this piece of land, did you read over what you were buying?

MR. ORSECK: Your Honor --

THE COURT: I sustain an objection to the form of that question.

Q In your ten or eleven years as the president, when you sign any agreement to purchase anything, do you

read it over before you sign it?

MR. ORSECK: My objection is that this is not an analogous situation.

THE COURT: I do not want colloquy. The objection at this point is overruled.

(Question read.)

A I read it to some extent. At times I may retain an attorney and read it partially and then rely on my attorney's advice and sign it. It depends on the situation.

Q If the transaction involves $12,500, do you read the papers before you sign it?

THE COURT: I sustain the objection.

Q I show you Exhibit O in evidence and I ask you if that is your signature.

A Yes, sir.

Q Could you tell us where you were when you signed that document?

MR. ORSECK: Your Honor, cross examination does not entail the same questions somebody else asked.

THE COURT: I was going to suggest that we avoid unnecessary repetition. This has been established as having been signed in her lawyer's office.

MR. GRUBBS: This is a little different.

Q Tell us where you signed this.

A I believe it was in Ted Drew's office.

Q I beg your pardon?

A Ted Drew's office.

Q Where is his office?

A Broadway, in Monticello.

Q Was there a notary that executed it?

A I imagine there is a notary in his office, yes.

Q Take a look at the notarial stamp and see if that refreshes your recollection where it was signed.

A I can't make it out. Oh, Freedman. The name doesn't mean anything to me.

Q Does it place where the notary is certified refresh your recollection as to anything?

A I can't make it out. I think it says Queens County.

Q Did you have a residence in Queens County?

A Yes.

Q Do you remember whether or not you signed that in Queens County?

A Now that it is indicated here, I could well have done so. If it says Queens County. I am not sure. It is very illegible.

MR. GRUBBS: I will read to the jury from the exhibit.

THE COURT: It is in evidence.

MR. GRUBBS: "State of New York --"

MR. ORSECK: It says "County of Sullivan," and it is a notary's name. That is the reason for the objection.

THE COURT: Come to the side bar.

MR. GRUBBS: The notary certificate I am going to read.

THE COURT: Off the record.

(Discussion at the side bar.)

THE COURT: I will not permit you to read where the notary is qualified in trying to show she signed it in Queens County. Notary publics can act anywhere in the State of New York.

MR. GRUBBS: I wanted to refresh her recollection to show that she does not know where she signed it.

THE COURT: You have done that.

(In open court.)

Q Is it fair to say that you are not sure where you signed this exhibit?

A I don't recall at this time.

Q Where do you keep the seal of Doralee Estates or where did you keep it in 1972?

A It is always in Sullivan County on the Doralee premises.

Q So you keep it there?

A Yes, sir.

Q Did you sign it on the premises of Doralee Estates?

MR. ORSECK: Objection.

THE COURT: Overruled.

A I don't think so.

Q Is it fair to say you do not really know where you were when you signed this, Exhibit O in evidence?

A I know the seal was never in New York. The seal was always in Sullivan County.

Q Did you just tell us before that the seal was kept in Doralee Estates?

A Yes. But it can be taken from there to Mr. Drew's office.

Q Was Mr. Drew present?

A I don't remember.

Q When you signed this Exhibit O, you knew that that had to do with a lawsuit that had just been settled, did you not?

MR. ORSECK: Lest I waive the objection it is still --

THE COURT: Overruled.

The question is a very narrow one. Please answer

it.

A Yes.

Q With your years of experience in business, did you consider such a document worthy of your time to read it?

A Not really.

Q Were you present in court at the time the stipulation of settlement was put on the record?

A Yes.

Q Did the Court ask that that stipulation be read in its entirety to you and your husband?

A Yes.

Q Was that stipulation read in its entirety to you and your husband?

A Yes.

Q After it was so read, did you consent and agree to the terms and conditions of the stipulation?

A To the stipulation executed in the court in the presence of Judge Pitt, yes.

Q You knew in the presence of the Court the stipulation you were entering into was a business matter, did you not?

A I don't know what you mean by a business matter.

Q It was a matter that required a certain amount of attention and purpose to it?

MR. ORSECK: Your Honor, I object.

THE COURT: Sustained.

MR. ORSECK: It was what it was.

THE COURT: I sustain the objection.

Q Was this one of the stipulations that was read to you in the presence of the Court --

MR. ORSECK: I object and I resent the question because counsel knows that there was not any other --

THE COURT: The question of which one.

MR. ORSECK: There was not ever --

MR. GRUBBS: I will read the part that the witness said she had not been read to her.

MR. ORSECK: She never said that.

THE COURT: Put a question, please. I take it this is from the proceedings in Sullivan County at the Supreme Court. You may read it.

MR. ORSECK: My objection is --

THE COURT: You have nothing to object to. There will be a portion of the Supreme Court record in Sullivan County read.

MR. ORSECK: There is an impression from counsel's question that there were two stipulations. I would like Mr. Grubbs to say that that is not so, so the jury does not think by his question perhaps there are.

MR. GRUBBS: Counsel misheard what I said. I said the second paragraph of a stipulation.

MR. ORSECK: That's different.

Q Was this one of the stipulations of the whole stipulation that was read to you before the Court --

MR. ORSECK: I object to the form.

THE COURT: Put your question.

Q (Reading): "It is further stipulated and agreed by and between the attorneys for the respective parties in consideration of the aforementioned payment in the sum of $12,500 that the plaintiff herein and its successors and assigns and its officers and directors individually shall forebear commencing any suit against the defendants, their successors and assigns and waive any rights to any claims against the defendants herein by reason of the operation of their said premises as a bulk oil distribution plant and gas distribution depot on, and all facilities now used in relation thereto, for a period of six months commencing on the date here of April 25, 1972 and terminating on the 24th day of October, 1972 provided that the defendants comply with the terms of this stipulation hereinafter set forth regarding a correction of their premises pursuant to a plan to be submitted to the Court for approval."

That was one of the stipulations you agreed to?

A That was the only stipulation I agreed to.

Q This was a stipulation you agreed to?

A Yes, but not one of the, but just that.

MR. ORSECK: Counsel would stipulate --

THE COURT: I think our problem is that the word "stipulation" to you has paragraphs and to her has an entire morning's proceedings in Sullivan County.

Q The stipulation that I just read to you was one that was read to you in court before the Justice of the Court and you agreed to it?

MR. ORSECK: Let me voice my objection. Part of the stipulation. That is what it is and it is important. That is my objection.

MR. GRUBBS: The first time I put it and said it was part, it was objected to. Now I read it and say, was this the stipulation, and now it is objected to because it is only part.

THE COURT: I do not think there is any problem. We all have to understand that this is a portion of a document that is a portion of a transcript.

Mr. Orseck, sit down. I think we are doing all right.

MR. GRUBBS: Read the question so the witness can answer it.

MR. ORSECK: The objection was sustained.

THE COURT: May I take your question over.

You had something read to you. Was that part of the proceedings in Sullivan County Supreme Court on that particular day?

THE WITNESS: Yes.

THE COURT: You heard that said as part of the proceedings?

THE WITNESS: Yes.

Q You consented to that provision that was just read to you, did you not?

A Yes.

Q Before you consented to it, did you discuss the matter with your attorney?

A I discussed it with the judge.

Q Not only with the attorney -- you did it with the judge too?

A Yes.

Q In other words, you discussed it with the justice that was presiding. Do you remember his name?

A Yes.

Q What was his name?

A Judge Pitt.

Q Were you represented by counsel while the Court

discussed the stipulation with you?

A Yes.

Q And he was present?

A Yes.

Q And your husband was present?

A Yes.

Q Before you agreed to this stipulation did you consider it for some length of time and discuss it with your attorney?

MR. ORSECK: I object to the line of the questions. Mrs. Huss in this complaint agrees that she is bound by this stipulation and we are bound by it as a matter of law. We consent that we are. There is no purpose served by these questions, your Honor. That is my objection.

MR. GRUBBS: At this time I will ask the Court to request counsel to desist making speeches when a simple question has been asked.

THE COURT: Do not do that.

That objection is overruled.

Let's go ahead.

Did you discuss it at any length of time with your lawyer before this was read to you?

THE WITNESS: I spoke about it to the lawyer, yes.

Q And that discussion you had with your lawyer took

1 some considerable time, did it not?

2 A No.

3 Q How long did you discuss it with your lawyer

4 before you went before the judge?

5 A This took place in the judge's chambers.

6 Q Pardon me?

7 A This took place in the judge's chambers.

8 Q For how long were you in the judge's chambers?

9 A I don't know. Maybe 15 or 20 minutes.

10 Q Before you went into the judge's chambers didn't

11 you and your attorney have some discussion on these various

12 proposals?

13 A Yes.

14 Q Did he consult with you with what you would

15 accept and did you tell him what you insisted on?

16 A Yes.

17 Q It was only after considerable discussion between

18 you and your attorney before you went before the Court --

19 A Not considerable.

20 Q How much time?

21 MR. ORSECK: Objection.

22 THE COURT: Overruled.

23 A There was not much involved to discuss.

24 Q How much time did you talk to your lawyer before

25

you went --

A Five minutes. Maybe three minutes.

Q Was $12,500 ever paid at the completion of that case?

A Definitely not in completion of the case, no.

Q A few weeks later did you receive it? Was the $12,500 ever paid?

A It was paid butyou are implying in completion of the case which is wrong.

Q Whenever it was, whether a few days or a few weeks or a few months, was it paid?

A Yes.

Q Have you ever returned that money that was paid in settlement of that case?

MR. ORSECK: Objection, your Honor. There is no obligation to.

MR. GRUBBS: Objection, your Honor.

THE COURT: Overruled.

If you have something you want to bring up on redirect make a note of it.

MR. ORSECK: I only noted an objection. I didn't say anything.

THE COURT: Was the money ever returned?

THE WITNESS: I don't understand the question.

THE COURT: Did you ever deliver back to either of the parties here $12,500?

THE WITNESS: No.

THE COURT: Next question.

Q The day that the stipulation was read to you in court, was it not April 25, 1972?

A If you say this was the date I would assume so.

Q Was it several days later before you signed and had notarized Exhibit O in evidence?

A I from memory cannot fix the date. But if you say it was several days later, I'll accept it.

Q Before you agreed to the stipulation read to you in court, did you discuss it with your husband?

A No. I discussed it with Judge Pitt. I only wanted it clear in my mind what that stipulation meant and Judge Pitt made it very clear to me.

Q When you first purchased the Doralee Estate premises on Cold Spring Road, would you tell us something about the condition of the premises you purchased.

MR. ORSECK: Objection, your Honor. It is remote.

THE COURT: 1965?

MR. GRUBBS: Yes, your Honor.

THE COURT: Unless you can convince why it is relevant I would sustain that objection. Do you press it? Come to the side bar. (At the side bar.)

(In open court.)

Q At the time you commenced operating Doralee Estates as a bungalow colony, would you tell us of the condition of the bungalow premises when you purchased it.

MR. ORSECK: Objection.

THE COURT: Overruled. I will permit this to a limited extent.

A The bungalows were in very good condition.

Q Did you ever testify under oath that they were in severecondition when you took over?

A Severe condition?

Q Yes.

A I don't know what severe condition means.

Q I read from the transcript of the first trial, page 12:

"Q And will you tell me with respect to these tenants whether you had any complaints from your tenants in the season of 1976 repsecting the operation of a colony?

"A It was quite a hectic summer of '65. I think it is important for me to state that we came in in April, which is quite late for taking over a bungalow colony that had been in severe shape the year before."

Tell us what you mean by "severe shape."

MR. ORSECK: Your Honor, that is not impeachment.

THE COURT: Let's see what the answer is.

Overruled.

Q Tell the Court and jury what was the severe shape that you found the premises in.

A The reference --

MR. ORSECK: That question is not right.

THE COURT: The first question is all right, the second not.

A The reference is not to the bungalows. The bungalows was in good shape. The grass had not been cut. The place was in receivership and, as a matter of fact, we had gotten a permit to burn some of the grass down so that we would get nice lawns and we had a lot of work to do. The general work maintenance work that had to be done in order to open the season.

Q At any time from the time that you have been operating the Doralee Estates, bungalows, had you ever realized more gross income from the rentals than $21,000 that you received in 1973?

A No.

Q That is the highest you ever made?

A That included winter rentals.

Q I am asking you for total rentals.

A Yes. That was the highest.

Q Tomorrow will you or your attorney bring your '74, '5 and '6 rental income figures.

MR. ORSECK: '74 is in court. '75 and '76, it is in the process of being mailed. He says tomorrow but he means Monday or Tuesday. Maybe he will have them tomorrow but Monday for sure.

THE COURT: You are mailing them tomorrow so he will have them Monday?

MR. ORSECK: Yes, sir.

Q Since you originally purchased Doralee bungalows, have you enlarged the rental capacity in any way?

A Not of any consequence, no.

Q To what extent have you enlarged the rental capacity?

A One additional rental unit, one mobile home is rented.

Q Did you testify yesterday that you did install three mobile units?

A Yes, but they are not rented.

Q They were not for rental purposes?

A No, sir.

Q What are the additional mobile units used for?

A I occupy one. A worker occupies another one.

Q Did your experience in renting it justify you

adding these additional units?

MR. ORSECK: Objection.

THE COURT: Sustained.

Q When you installed these additional mobile units or three mobile homes, was it because you wanted to increase the rental units available for letting?

A Yes. I wanted to.

Q Isn't it true that along Cold Spring Road from the village to your premises Cold Spring Road is of a commercial nature?

A That's generalizing.

Q Were you present when the real estate witness so stated in this court?

A Some part of Cold Spring Road is.

Q Let's take it bit by bit.

Is there a town barn across from your premises?

A It is on the other side of the street.

Q Across the street?

A Not directly across the street, no, sir. Not directly across the street from my entrance. It is a little further down, yes.

Q At the last trial were you asked this question by your attorney and did you give this answer:

"Q And are you familiar with what geographically lies

between your property and MGO's property?

"A Yes.

"Q Will you tell me what?

"A Well, there is a village barn opposite my place. There is a village barn, a gas distributor, there are a couple of houses."

Were you asked that question and did you give that answer in the prior trial?

MR. ORSECK: Objection.

THE COURT: Overruled.

A That is the answer I gave, yes.

Q Is is true that there is a village barn opposite your place?

A On the opposite side, yes. I said that.

Q Are there any petroleum or oil tanks at the village barn?

A No, sir.

Q During one of the recesses at the last trial were you questioned thereafter with the following questions and did you give these answers:

"Q Mrs. Huss, did you go home for lunch just now during the recess?

"A Yes.

"Q Did you have an opportunity to look out your front

gate when you came back from lunch?

"A I didn't go to the front gate to look out, no.

"Q When you drove in did you drive in through the normal place that you said is the main entrance to the property?

"A Yes.

"Q And when you drove out did you drive out through the main entrance on the property?

"A Yes.

"Q Did you see the gas tank and a pump of the county or village Highway Department?

"A I glanced over that way. There is a tank, a gas pump there, yes."

MR. ORSECK: Your Honor, I object to this on a number of grounds. This is 1972. He asked her about now. That is why impeachment has to be carefully done and it is not for me to bring up in redirect. I have a right to object now on the grounds it is not impeachment.

MR. GRUBBS: If your Honor please, I ask that any such volunteered statement --

THE COURT: The jury has been told many times that nothing counsel says is evidence.

MR. ORSECK: I object on the further ground because it tends to lead the witness or suggest an answer.

THE COURT: Please proceed.

Q Isn't it true that there still is a village barn across from your property?

A Yes.

Q You see it when you come out your entrance; isn't that true?

A It depends on what you are looking for. Not necessarily.

Q During the recess at the last trial you saw it after lunch, did you not?

A You just asked me about a fuel tank. There are no fuel tanks.

Q Is there a village barn there?

A Yes.

Q And you say the village barn has no fuel tanks there?

A No, sir.

Q There is no tanks at the village barn?

A Definitely not. There is a small pump that has not been in use in years.

Q There is a pump?

A A small pump.

Q What kind of pump?

A Small little pump.

Q Does it look like a gasoline pump you see at a filling station?

A Yes.

Q In addition to the town barn, is there any other oil distribution plant called Monarch Oil Plant along Cold Spring Road?

A Very close to Broadway, Monticello, yes.

Q Does that have any petroleum tanks in it?

A Yes.

Q Do you know what brand of gas it sells?

A No, I don't.

Q Is there any Texaco station between Monticello and Duralee Estates?

A There may be a small two-pump place near Broadway.

Q Is there any Pargas plant or distribution, filling of tanks?

A No.

MR. ORSECK: Your Honor, that question is irrelevant and it is misleading. If we may approach --

THE COURT: Do not argue. She says there is no such.

Q There are no Pargas tank fillers in the vicinity; is that right?

MR. ORSECK: Bottled gas? He is making this jury believe it is petroleum products. Pargas is bottled gas. It is a commercial institution.

THE COURT: If it is for bottled gas I do not see how that has the slightest relevance to the oil issue. That is what counsel is objecting to.

MR. GRUBBS: I am bring out the commercial nature of the neighborhood, of this bungalow neighborhood.

THE COURT: Do it with a little more specificity in terms of what the issue is. Counsel was objecting because he felt the witness was being questioned as to whether there was not fuel oil coming from this facility. If that's the purpose of the examination, I would sustain the objection.

Q Is propane gas a petroleum product?

MR. ORSECK: Your Honor --

THE COURT: I sustain your objection.

Q Other than these commercial --

MR. ORSECK: That was fed to him.

THE COURT: Mr. Orseck, you do not help by doing that.

MR. GRUBBS: May we have a conference at the bar if I am going to be obstructed --

THE COURT: We will take a brief recess and given the nature of it whether we will quit a little after four.

Take a recess and everyone will have a chance to assess where we go from here.

Ten minutes.

(Recess)

Q Also along Cold Spring Road is there a Wechsler Pool installation?

A Not an installation. They sell pool supplies.

Q What do they sell there?

A Packaged stuff, pools, sealed cartons and stuff.

Q Is there any dump in the area or general vicinity of Doralee Estates?

A Not to my knowledge.

Q This swamp that you talked about earlier, the swamp covers quite a large area, I believe you said. Could you tell us in acres what that acreage is?

A Actually it is characterized as a natural life preserve by New York State and it covers quite an area.

MR. GRUBBS: I move to strike that.

THE COURT: I deny the motion.

MR. GRUBBS: I will reput the question.

Q I ask you again: When you testified earlier today you said that the swamp at Doralee Estates covered quite a large area. I am asking you if you would be good enough to tell us the size in acres.

A A few acres. Three or four acres possibly.

Q Does that swampland of three or four acres create a mosquito problem during the summer?

A Not at all.

Q Are there houses in the neighborhood of Doralee Estates that are old and run down?

A Some.

Q How many of those would you say there were?

A One or two.

Q In the yards of those rundown houses, is there a lot of discarded machinery, etc., plumbing, etc.?

A I have not noticed any machinery or plumbing.

Q What have you noticed?

A One has the windows boarded up. It is not in use.

Aren't there other deserted houses in that area?

A Not to my knowledge, no, sir.

Q What is the size of the swimming pool you have on Doralee Estates' premises?

A I believe it is 25 by 70.

Q That was there when you first started operating the bungalows?

A Yes.

Q Would you be good enough to tell us approximately

how many of the agencies or government officials you contacted in connection with the sewerage problem you were having on Doralee Estates during 1972?

A Maybe two.

Q Would you tell us what they were?

A D.E.C., I believe.

Q In April of '72 you wrote to Senator Buckley of New York, the U.S. Senator?

A Yes.

Q When you wrote to him did you complain about the discharge of sewerage on your premises?

A Not on my premises, to my premises.

Q In addition to Senator Buckley, to whom else did you complain about the sewerage problem that you were having?

A Department of Environmental Conservation.

Q Anyone else?

A Agencies? I don't think so.

Q Did you ever talk to the village manager?

A Regarding --

Q The sewerage problem.

A Yes. I believe I did.

Q You did talk to Mr. Belmont?

A Regarding the sewerage problem?

Q Yes.

A Well, not exactly regarding the sewerage problem, no, sir.

Q Did he promise to let you connect to the village sewers?

A As part of the consideration for my giving 1700 feet to the village, yes, sir.

Q How about Mr. Block, did you ever talk to him about your sewerage problem?

A Yes. Not about my sewerage problem, about -- may I continue? It was not about my sewerage problem, no, sir.

Q Whosever sewerage, it was about sewerage on your premises?

A Yes. I did discuss it with him.

Q How about the town supervisor. Did you talk to him or them about the sewerage problem, about sewerage coming on your property?

A Yes, I did.

Q Is there any other official or agency that you complained to about the sewerage problem that you were experiencing on your property?

A I would imagine I spoke with everyone connected in some way in resolving such a problem.

Q So you found the problem to be a very substantial

one, did you not?

MR. ORSECK: The question is argumentative in that form.

THE COURT: Sustained.

Q You still have some septic tanks on Doralee Estates; is that correct?

A Yes.

MR. ORSECK: I object to that. It is not proper cross examination --

THE COURT: It may be repetitious but I will permit it.

Proceed.

Q As a matter of fact, at the end of '72 you still did not have use of the village sewers, did you?

A No, sir.

Q Would you say it was well into '73 before you were able to tie into any sewerage of the village?

A When the trunk line was in, whenever that was.

Q It was well into '73, was it not?

A Possibly.

Q In the complaint to the New York State Conservation Department I believe you mentioned what you said was a heavy discharge of raw sewerage. Could you tell us what raw sewerage is?

A An exaggeration --

MR. ORSECK: The question exactly, identically was asked by Mr. Colin. I object on the ground of repetition.

MR. GRUBBS: It was the omission that brought it to my mind. I am asking her to tell me what she meant by raw sewerage.

THE COURT: We have had that. Do you want a definition?

Q Tell the Court and jury when you wrote to the New York State Conservation Department complaining of a heavy discharge of raw sewerage to your property, what were you describing as raw sewerage?

MR. ORSECK: That has been asked and answered. That is not the question the Court just permitted.

THE COURT: Sustained. That we did already. We have been through that with Mr. Colin. Your earlier question was what is raw sewerage.

What is it?

THE WITNESS: What it meant to me, the people didn't have proper sewer installations and what should have gone --

MR. ORSECK: I move that be stricken.

THE COURT: Let her go on.

THE WITNESS: What should have gone through the sewer installations went out without being treated.

Q During the pendency of this suit, did you go to your attorney, Mr. Orseck's office from time to time?

A Yes.

Q On any of those occasions did you see whether or not Mr. William Edison had an office in the same building?

A I never saw him there except once when we had a meeting.

Q Did you ever know whether or not he had an office in the same building?

A No, sir. I know that's their building, the Orseck Building. They built it.

Q Are there other real estate people that have offices in the same building?

A No, sir.

Q Do you know whether or not Mr. Edison has ever had an office in the same building that Mr. Orseck has been in?

A No, sir.

MR. GRUBBS: May I have a brief side bar conference?

THE COURT: Yes.

(At the side bar.)

MR. GRUBBS: I would like now -- if I am not able to do it before the jury -- to have an offer of proof as to what if anything has happened to the value of her property since 1972.

THE COURT: What do you expect to establish by something of that kind? What are you talking about?

MR. GRUBBS: About her own valuation of the property.

THE COURT: Are you sure you want to ask her those questions?

MR. GRUBBS: Yes.

(Continued on next page.)

(In open court.)

Q Mrs. Huss, did you put your property up for sale in the early '70s, '72, '73?

A I think I did. I can't pinpoint the time but I did at one time.

Q Would you be good enough to tell the Court and jury at what price you listed it in '72?

MR. ORSECK: I object.

THE COURT: I will overrule that.

A I don't remember. I was told it was unreal.

Q Did you subsequently in '75 again list your property for sale?

A Yes.

Q Did you put a yet higher price on it in '75 than you did in '72?

A I don't think so.

Q Would it refresh your recollection if I stated a figure to you?

MR. ORSECK: Your Honor, I would object. Suppose for argument's sake she wanted $1 million.

THE COURT: You want her to say what her asking price was?

MR. GRUBES: '72 and what it is in '75.

THE COURT: At this point I will sustain the

objection. What her asking price is I do not believe is relevant to any issue before us.

MR. GRUBBS: After the jury has been excused, could I make an offer of proof?

THE COURT: Yes.

You have no further questions?

MR. GRUBBS: No, your Honor.

(Continued on next page.)

REDIRECT EXAMINATION

xxx BY MR. ORSECK:

Q When I examined you earlier, or it might have been when I took exhibits from Mr. Kwak's file, I asked you if you had written letters of complaint in September and October of 1972 about the discharge of neighbors' sewerage into the swamp and then into your lake; is that correct?

A Yes.

Q You were also here when Mr. Hudson testified that after the complaint came to DEC's attention, he came down and made dye tests and found there were two or three neighbors from whose homes effluent got into the swamp. Do you remember that?

A Yes.

Q He also testified that immediately thereafter, or sometime in 1973, that matter was cured.

A Yes.

MR. COLIN: Objection, your Honor.

THE COURT: I sustain this. We don't need to get into what Mr. Hudson testified to by affirmance of this witness.

Q After 1973 there was never complaint by you of any sewerage problem of any kind, nature, or description?

A Yes.

MR. COLIN: Objection.

THE COURT: Put that in terms of whether there was any condition and then I would overrule the objection.

Q Was there any sewerage in any amount, no matter how small, that you noticed after the beginning of 1973?

A No.

MR. COLIN: Objection.

THE COURT: Overruled.

Q There were a series of photographs which Mr. Colin introduced and which he showed to the jury. I don't know the numbers. They showed the bungalow colony, or portions of it, in April of '72. Do you know those black and white 8 x 10s you saw earlier today?

A Yes.

Q They were taken in April of 1972?

A Yes.

Q Would you tell the jury what you have done every September since you bought the bungalow colony? What do you do in September?

A We close the place.

Q Where do you go?

A To Florida.

Q When do you come back?

A Usually April or May.

Q What happens to the bungalow colony during the months from September to October?

MR. GRUBBS: Objection.

THE COURT: Overruled.

A There is vandalism frequently.

MR. COLIN: I move to strike the answer, your Honor.

THE COURT: I will permit it if you focus in some extent on the black and white pictures which is the subject of your inquiry.

Q On every year when you start to rent it is about when?

A Generally May, April.

Q Are the signs lying down on the side of the road after youhave been there and you start to rent?

A No.

Q Is the grass cut?

A Definitely.

Q Is any junk lying around in the bungalow colony?

A No.

Q These pictures show that that is the case. Would you explain that to the jury?

MR. COLIN: Objection.

THE COURT: Overruled.

A These pictures were taken during the course of renovation and preparation for the coming season.

Q Is that the same every April?

A Yes, sir.

Q And the place doesn't look like this during the summer season when the guests are there?

A I don't think they would come back if it did.

MR. COLIN: I object to that.

THE COURT: The answer is no?

THE WITNESS: No.

Q Can you tell the difference between raw sewerage and oil? I use "raw sewerage" for lack of another expression.

A Definitely.

Q Three summers ago was Mr. Colin up at the bungalow colony with you and I?

A Yes.

Q Did he walk through the premises?

A Yes.

Q Was there oil on the lake?

A Yes.

Q Did he say that it was a nice place?

A Yes.

MR. COLIN: That is objected to, your Honor.

THE COURT: You tarried with that objection.

MR. COLIN: I was and I have been a little tarried, unfortunately, with many proper objections that could have been made to Mr. Orseck's methods.

THE COURT: Strike that out. The jury will disregard it.

Ladies and gentlemen, you are to decide this case on the evidence that you have heard. Mr. Colin is not here even by hearsay as an expert witness. Strike that comment out.

Q I forget which counsel asked you about the bills, but on the billhead it said Monticello Gas & Oil?

A Yes.

Q Was there any design or figure or figurine on the bills too?

A Yes.

Q What was it?

A A Cities Service triangle, whatever it is.

Q In 1972 the village started to construct a sewer line through your premises?

A Yes.

Q Did that necessitate the lake being drained?

A Yes.

Q When Mr. Colin asked you questions about one of the lakes being drained, do you recall that you were referring only to the previous summer?

A Yes.

MR. COLIN: I object.

MR. ORSECK: I will read it to the jury.

THE COURT: Put the question and answer and ask her if that's the testimony she gave.

MR. COLIN: My objection was to the leading nature of the question.

THE COURT: That objection I would overrule. This is redirect examination and addressed to something you brought up on cross.

Q From page 179, Mr. Colin's question:

"Q Have you seen substantially the same thing as you viewed the pond and the lake during the summer season?

"A During the summer season there was less water in the pond.

"Q Let us see if we can't get it clear.

During the summer season you had some water in the pond; didn't you?

"A Some, very little.

"Q Well, two thirds of it, or does it dry dry up?

"A It dries up."

Has the lake ever been dry except when the lakes were drained during the summer of 1972?

A No.

Q Tell the jury what the status of the lower lake is now.

A It was in such bad condition that we attempted to put fill into it and make it into land rather than the lake. We got permission from New York State to fill it in. The rocks, everything contained in that smaller pond, is saturated with oil. It is visible.

MR. COLIN: I object to that.

THE COURT: I sustain the objection.

MR. COLIN: I move to strike.

THE COURT: Strike it out.

You attempted to fill it?

THE WITNESS: Yes.

Q During the years 1974, 1975, and 1976, tell the jury if you had one single solitary tenant during those years who was ever there before?

A Not one.

Q That's a matter of documented leases?

A That's correct.

Q Mr. Grubbs was asking you about your home in Florida and your home in Queens and your home in Sullivan County. Up at the bungalow colony there is a mobile home, correct?

A Yes. That's where I live. I live in the mobile home.

Q Where do you live in Queens?

A In an apartment.

Q Where?

A Sunnyside.

Q What is the address?

A 42-15 43rd Avenue, Sunnywide.

Q How long have you lived there?

A About eighteen years.

Q What is the rent?

A $140 a month.

MR. GRUBBS: This is extraneous, your Honor.

THE COURT: Overruled.

Q What about in Florida?

A If I ever pay the mortgage I might own the house.

Q How much is the mortgage?

A $20,000.

Q Other than the bungalow colony, is the place in

Florida the only real property --

MR. GRUBBS: Objection.

THE COURT: Sustained.

Q Do you own any other real property other than the place in Florida?

A No.

Well, the property in Monticello, that's mortgaged.

Q I want you to do one last thing, and another question, and we can go. Would you slowly explain to the jury where from the beginning of Cold Spring Road, which is under the traffic of Monticello, take it down building by building, the best you can, past Doralee Estates; please do that.

A I will try.

Q Please.

A It begins as St. Johns Street. This is at Broadway in Monticello.

There is a high school; there is a professional building; there is a seminary.

Q How about the Episcopal Church?

A Yes. There is a church. Then there are some very nice homes; then there are the structures that were mentioned.

Q How about the lumber company?

A Yes.

Q Right next to that, is there a Texaco Station?

A Something with two pumps.

Q Is that more than a mile from your place?

A Yes.

Q How about Monarch Oil? How far is that from your place?

A That's near Broadway and Monticello.

Q That's in the village with the sewer system?

A Yes.

Q And it always has been?

A Yes.

Q Are there brand new offices, doctors' offices?

MR. GRUBBS: I object to the form of the question. The attorney is testifying.

A Yes.

THE COURT: Overruled.

Q Are they there?

A Yes.

Q When were they built?

A About two or three years ago.

Q That's on the Cold Spring Road?

A Correct.

Q Mr. Grubbs handed you an application for a zoning permit for 17 mobile homes; is that correct?

A Yes.

Q You said that that didn't go through?

A That's right.

Q Why not?

MR. COLIN: That is objected to.

MR. GRUBBS: I object to that.

First of all, I never handed her anything like that.

MR. ORSECK: Somebody did.

THE COURT: The question was asked whether or not this didn't show some attitude towards the property and an expectation about the future.

MR. COLIN: And whether it was approved or not.

THE COURT: Why isn't that material?

MR. COLIN: That's the action of the Government and not the action of this witness.

THE COURT: I will sustain the objection at this point. I will hear argument later.

Q Did you try to obtain financing for those mobile homes?

MR. COLIN: Objection.

MR. GRUBBS: Objection.

THE COURT: I will allow it.

A Yes.

Q What happened?

A The application was denied.

Q Why?

MR. GRUBBS: I move to strike. I object to that.

THE COURT: I will sustain the objection to the last question and permit the balance to stand.

Q Did the denial have anything to do with your personal credit?

MR. GRUBBS: Objection, your Honor.

THE COURT: Sustained. Don't get into this.

Q One question about this and no more: Did the proposed lender make an inspection --

THE COURT: No, counsel.

I will sustain an objection.

Q One last question: You were in court before Judge Pitt, were you?

A Yes.

Q And a stipulation was made on the record before the stenographer?

A Yes.

Q You said okay?

A Yes.

Q And Cities Service said okay?

A Yes.

Q And Monticello Gas said okay?

A Yes.

Q That was the deal?

A Yes.

Q There was no other deal?

A Yes.

Q Anything you signed after that --

MR. GRUBBS: Objection.

THE COURT: Sustained.

Q Did you ever have any intention to change the deal that was made?

MR. GRUBBS: Objection.

THE COURT: Sustained.

Q Did anybody from Cities Service or Monticello tell you that the deal before Judge Pitt is something else?

A No.

MR. GRUBBS: Objection, your Honor.

THE COURT: Overruled.

MR. ORSECK: That's all of this witness, your Honor.

THE COURT: Subject to the leases for a three-

year period --

MR. COLIN: That's what I will need in order to complete my recross.

THE COURT: That's the only reason I'm keeping the examination open of this witness.

At this point you are excused.

MR. GRUBBS: One question on recross, your Honor.

THE COURT: I do not see much need for it, but if you feel compelled to do so, all right.

We will excuse you except for this limited subject on Tuesday.

How much more do you have?

MR. ORSECK: Five or ten minutes, your Honor.

THE COURT: All right.

MR. ORSECK: Exhibit 11 for identification has been previously offered. I now offer it from the little arrow six or seven lines from the bottom to the bottom, and no more and no less. That is signed by Mr. Langbein.

THE COURT: Can we have some identification as to who "her" is?

MR. ORSECK: I have no idea. It is offered in the nature of admission and I really don't care.

THE COURT: I will admit it.

Let's not lose time. You look at this now and we will discuss it later.

What else?

MR. ORSECK: I want to read only two or three pages from the deposition of a Mr. Beck, Robert Beck, and I hope that Mr. Colin will agree that he submited him as a party on behalf of Cities Service.

THE COURT: Is there any problem with that?

MR. COLIN: I know I arranged --

THE COURT: He is an attorney?

MR. ORSECK: No.

THE COURT: You arranged for his presence?

MR. COLIN: Yes. I arranged for his presence as a witness to be deposed. He is employed by Cities Service.

THE COURT: What did he do at the time of the deposition?

MR. COLIN: I think his work was similar to Mr. Langbein's.

THE COURT: We will cross that bridge after. You may go forward.

MR. ORSECK: To save time, he testified he was the regional facilities manager.

MR. COLIN: That's a job title.

THE COURT: That doesn't make any difference at this point.

MR. ORSECK: I turn to page 15.

Robert Beck of Cities Service was examined June 25, 1975 in Mr. Colin's office:

"Mr. Beck, to your knowledge, was the plant in Monticello ever shut down?

"A Yes, it was.

"Q When was that?

"A In 1973.

"Q Do you have any document which would more accurately give us a closer date as to the exact date?

"A Yes."

A document was produced and the witness refreshed his recollection. Mr. Colin did not permit the document to be marked. His answer was:

"A To the best of my information, the date would be 1973."

THE COURT: Let's not continue. We are going to resume the case on Tuesday.

MR. ORSECK: That's it, your Honor.

THE COURT: Subject to that one piece of cross-examination of Mrs. Huss, that's the plaintiff's case?

MR. ORSECK: Yes, it is, with the reservation of the document of Cities Service which we discussed before the case started.

THE COURT: I understand.

We have maybe one or two little matters that would spill over to Tuesday.

T Ladies and gentlemen, you are xcused until Tuesday morning at ten o'clock. Don't discuss the case with each other or with anyone else. Continue to keep open minds. You have not heard the defendants' case.

(Jury excused.)

THE COURT: Mr. Colin, for the purpose of saving the Court's time and the jury's time on Tuesday, I am going to deem the plaintiff's case to be closed for the purpose of hearing motions to dismiss. The only thing open is a matter of credibility of one witness and nothing further.

Do you want to address me on the subject of the complaint at this point?

MR. COLIN: I would ask your Honor to permit me to make my motion on Tuesday morning rather than now. I am very tired. I don't feel well, as I indicated to you. My energy wanes as the day progresses, and a motion of this importance is such that I would like to have the opportunity to organize my thinking and my authorities and present that

to your Honor on Tuesday when I am physically and mentally more capable of doing so.

THE COURT: I will hear you at nine-thirty on Tuesday morning. We will resume at nine-thirty.

Can you make it?

MR. ORSECK: Yes, your Honor.

THE COURT: I will allow you half an hour for motions.

Mr. Orseck, what are the fourth, fifth, and sixth causes of action alleging $12,500 of consequential damages?

MR. ORSECK: That would be by way of argument and inference. Those consequential damages are as follows:

Mr. Rosch and Mr. Hudson testified that there is still oil in the swamp. Cities Service or MGO took three feet of oil from the ground at their plant; nobody took anything from the swamp. I believe that there is a fair inference that even if presently they gave us $21,000, or they didn't, if we managed to scrape the bottom of the lake there is a fair inference that the oil that is now in the swamp will again reach the lake which will involve and cause further damages. That, to me, is a classic. It is almost a classic illustration of what consequential damages are according to my research, and I believe that in detail the

cases supporting that theory appear in the requests for that charge which we have submitted.

THE COURT: What you say makes sense, but does this record support that?

MR. ORSECK: I intend to argue that it is for the jury to determine knowing full well that liquid runs down hill, there is still oil in the swamp, and eventually it is going to get into the lake. We don't need any expert proof on that at all.

#18 THE COURT: I am not aware of any testimony that there is oil today in the swamp.

MR. ORSECK: I believe there is a presumption of continuity.

THE COURT: I don't think I would charge a presumption of continuity. What I am going to charge, as I see it, is that the jury may, if they so conclude, determine that the oil in the bottom of the two ponds has risen to the surface as evidenced by photographs and testimony even today; they can find that that oil comes from the Monticello facility by way of the swamp and has been stored there and is being released to the surface in some way because it does not appear from a banana tree. It has to come from somewhere. It does not come from soot either. The record doesn't support that; but the record supports oil

traveling and being deposited in earth underneath these ponds in the vegetation that comes down from the swamp. Hudson says that. It gets on the plant life and the plant life dies and it goes to the bottom of the ponds and by accretion goes to the earth. Somebody found it in the earth. I believe Hudson and the bulldozer operator found it in the bottom of the ponds. That's perfectly reasonable to assume that that comes from the swamp, and the oil in the swamp comes from Monticello. I will not charge that there is still oil in the swamp.

I hope we can put an end to this litigation. If the plaintiff is to win, the plaintiff, presumably, will take the money it gets from the judgment and will replace the bottoms of these lakes and we will be finished with this case. If the plaintiff loses the case is over too. I am not going to charge that.

MR. COLIN: May I say in connection with what you indicated to be your intention to charge, that the testimony of all the witnesses was to the effect of acknowledging that oil floats on the surface of a liquid. I believe in terms of absolutely undefiable physical principle there cannot be oil at the bottom of any type of water. It is physically impossible. The oil must rise to the surface.

THE COURT: You are arguing with me as if you

pgem

were a biological physicist here. I am not discussing that. I am talking about what the witness Hudson said. He said he was with Rosch and they went around and they dug six places in one lake and three in another, and the oil was found in the bottom of the lake in amounts down to four, five, six, or seven inches. Where does that come from?

MR. COLIN: We have no expert qualification to call the material that.

THE COURT: If you slip on the highway on oil you don't need an expert. If he digs up something from the floor of the lake, I don't think we need a petroleum expert.

MR. COLIN: This is a muck material and he undertook to characterize it without any expert qualifications.

THE COURT: It is in the record. The jury may consider it. He is perfectly qualified in my opinion to give that testimony and for the jury to consider it. You can argue he is not qualified.

If you get that far where did it come from?

MR. COLIN: The muck?

THE COURT: The oil.

MR. COLIN: If we assume it is oil then I cannot answer your question.

THE COURT: You can answer it.

MR. COLIN: Black muck is decayed vegetable matter.

THE COURT: If you accept the fact that there is oil on the bottom of two Doralee lakes then it had to come from somewhere, and I ask you where on this record did it come from other than from the MGO facility, through the culvert, as the dye moved into the swamp, onto the vegetation and down into the ponds.

MR. COLIN: Then you have the problem of divorcing the pre-1972 period from post-1972.

THE COURT: In my judgment I thought about that because that does present a little bit of a problem. How do you do that? In other words, it seems to me utterly reasonable that if you have a settlement of an action with a promise on the part of two, what I call, wrongdoers, because they paid $12,500, with a promise on the part of the two wrongdoers to remedy a situation, and the jury is to conclude that instead of remedying it it was "sloppy oil as usual at the old MGO for another year," I don't feel that the burden should be on the plaintiff to say how much of the oil in the bottom of their lakes came from the year after the settlement and how much came from the year before the settlement. I don't think that burden has to shift at that point. If they find they are wrongdoers and discontinued, it is obviously

reasonable to conclude that some of that continued to pollute the lake, and if that does happen and it does not seem to me the burden shifts to the plaintiff to prove how much is before and how much after. It seems to me if anything the burden is on the wrongdoer to prove that only half of the damage is due to our oils after and half is before or whatever the percentage is that you may conclude is applicable to each period. I certainly don't think a wrongdoer can put on an injured plaintiff the burden of showing how much oil came before and how much came after in these circumstances, but it is a point. I have thought about it. In mulling it over I concluded that that is clearly the way I see it.

I will see you at nine-thirty on Tuesday.

MR. COLIN: Your Honor, I object to Plaintiff Exhibit 11 for the reason it relates to a period after Monticello Gas & Oil vacated the premises so it is a fact that on June 6, 1973 this property was a CITCO property as stated here. I think it would be highly prejudicial to admit it because what we are concerned with is the earlier period. This post-dates the undisputed removal by Monticello Gas & Oil, which was in February.

THE COURT: From the words "I told her" there on down I will accept it. The remainder is excluded.

(Adjourned to January 11, 1977, 9:30 a.m.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DORALEE ESTATES, INC., a New York Corporation, Plaintiff,	Before: HON. RICHARD OWEN, District Judge.
vs.	
CITIES SERVICE OIL CO., a Delaware Corporation, Defendant and Third-Party Plaintiff,	73 Civ. 907
vs.	
MGO CORP. and MONTICELLO GAS & OIL CO., INC., Third-Party Defendant.	

New York, January 11,12,13,14, 1977

STENOGRAPHER'S MINUTES

#19

DORALEE ESTATES, INC.,
vs.
CITIES SERVICE OIL CO., 73 Civ. 907
vs.
MGO CORPORATION

January 11, 1977
9:45 a.m.

THE COURT: Let the record show that this session was announced for 9:30. This is basically a motion by the defendant Cities Service Oil. It is now a quarter to ten. This is at the close of the case against Cities Service. Mr. Grubbs, to the extent he may have standing here, does not have a stake necessarily in the outcome of this, and being a third-party defendant, and given his absence, I am going to proceed without him at this point.

To the extent that Mr. Grubbs is interested in these proceedings, would you kindly inform him that he may have the court reporter read to him such of the proceedings as will bring him up to date as and when he arrives.

MR. COLIN: I will do so.

If your Honor please, the defendant Cities Service makes the following motions:

First, to dismiss all claims as to Cities Service Oil Company.

Second, to dismiss the claim for punitive damages.

pgem

Third, to dismiss the claim to set aside the general release delivered by the plaintiff to the defendant Cities Service.

Fourth, to dismiss the claim for $100,000 based on diminution in the value of the property.

Fifth --

THE COURT: Which one is that?

MR. COLIN: That's alleged, if your Honor ease, in Counts 1, 2, and 3, in which $100,000 is explicitly demanded on the ground of diminution in value of the premises.

The last motion that we make is to limit the defendant's damages to the $12,500 pleaded by them as their damages for the period after April 25, 1972.

The structure of the complaint, your Honor perhaps has observed, is that the first three causes of action are grounded in nuisance, trespass, and negligence. The fourth, fifth, and sixth causes of action are ancillary to the first three alleging consequential damages.

I don't believe the fourth, fifth, and sixth are, of themselves, causes of action. I think they may fairly be regarded as parts of causes --

THE COURT: Perhaps this would help us all to focus and save us a little time: I understand from the

1 previous discussion I had with you, Mr. Orseck, that 4, 5,
2 and 6 had to do with your concern that there was oil remain-
3 ing in the swamp that would eventually find its way down?
4 MR. ORSECK: Yes, sir.
5 THE COURT: You acknowledged to me that there
6 is no proof at this point as to oil in the swamp that is
7 eventually going to find its way down. You say that that
8 is an inference that one can draw, but you have no proof
9 as to that.
10 MR. ORSECK: Precisely.
11 THE COURT: I will dismiss 4, 5, and 6, and
12 you may not concern yourselves with those further.
13 MR. COLIN: The grounds of the motion --
14 THE COURT: That gets rid of your motion No. 5,
15 which is to limit damages to $12,500.
16 MR. COLIN: I think it would, sir. The grounds
17 of our motion directed to all the claims of plaintiff against
18 Cities Service Oil Company is that the proof in this case
19 is that Monticello Gas & Oil, MGO, was the sole occupant
20 and operator of the premises, and that there were no Cities
21 Service personnel stationed there. This proof was given by
22 Mr. Sam Greene of MGO and was confirmed by Mr. Langbein.
23 (Mr. Grubbs entered the courtroom.)
24 THE COURT: You missed practically nothing,
25

Mr. Grubbs. We started five minutes ago. Mr. Colin has outlined his motions. I have dismissed 4, 5, and 6, being the ones for consequential damages. He has moved to dismiss all claims against Cities Service. He has moved to dismiss the punitive damage claim, and he has moved to dismiss the claim asking to set aside the release; he has moved to dismiss the three causes of action alleging diminution of value.

He has just launched into why I should dismiss as to all claims against Cities Service, and his first statement was that only your people were on the property throughout this period.

You are now up to date.

MR. COLIN: That was a very succinct analysis, your Honor.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Mr. Colin, I don't want to deprive you of making arguments that I am sure you have given substantial thought to, but it seems to me that on your No. 1, unless you have some way to avoid the impact of this, that motion is doomed to fail because on this record there is the agreement and the stipulation of April 25, 1972, in which your client undertook to do certain things in conjunction

1 pgem

2 with MGO and, therefore, it assumed the duty, whether or

3 not it was on the property.

4 Secondly, the record not only permits the

5 inference but is crystal clear as to the very structural

6 things that were going on at the MGO plant. It was Cities

7 Service and Cities Ser vice alone that could authorize that.

8 MGO might be there and might be the one seeing what was

9 happening, but in order to fix things up Sam Greene had to

10 call Langbein and say, "Do you authorize this? Can we put

11 in this? Can we change that?"

12 Langbein would have to take it up with his

13 people and say yes or no.

14 So the jury, it seems to me, could find the

15 MGO people there who were in effect agents for purposes of

16 the control of the problems at the premises.

17 Unless you can get around those two things,

18 it does no good to argue that nobody was there from Cities

19 Service.

20 MR. COLIN: I will try to address myself to

21 those considerations in the course of this argument.

22 The lease between MGO and Cities Service pro-

23 vices that MGO shall comply with all laws, rules, and regu-

24 lations of governmental authority, and that MGO shall main-

25 tain the premises.

Your Honor has adverted to the undertaking of Cities Service to make structural repairs. The proof in respect to the structural repairs shows no structural repair that has any bearing whatsoever on the events of this case. The repair of the roof had nothing to do with causing oil to enter upon the plaintiff's premises. The painting of the trucks and, indeed, any item of structural repair, is irrelevant to what happened here, because what happened here had nothing to do with the physical condition of the facility. It had to do with operational shortcomings, and the operational shortcomings are chargeable only to the party in possession and, in particular, what I refer to, your Honor --

THE COURT: Why can't the jury conclude that Cities Service equally with MGO undertook to see that oil would not flow onto the plaintiff's property? Why can't --

MR. COLIN: There is nothing in this case from which they could so conclude.

THE COURT: The agreement of April 25, everything about it is a statement. The oil has gone before. We will see that it does not. If we can't come up with decent plans we will close the plant down.

MR. COLIN: The plans were submitted and the plant was closed down.

I submit, your Honor, number one, there is no cause of action in this suit based on a breach of any agreement that may be contained in the settlement arrangement. In fact, the suit here is to the very contrary of that because they seek to set aside that agreement.

THE COURT: I agree that without getting it in any depth that perhaps the complaint here is inartistic in certain areas, but to the extent that it does not cover by leaps and bounds what is going on it certainly is open to a motion to amend to conform with the proof that we have taken, and at such time that I am sure that motion will be made it will be granted and we have litigated this five days of court time, and if there is a flaw in this complaint that causes it not to artistically state what we should be shooting at, I will certainly permit it to be amended to cover the proof that will be received.

MR. COLIN: I most respectfully differ with your evaluation of that settlement agreement.

THE COURT: Mr. Colin, the very first page says that the plaintiff waives any claim against the defendants here in consideration of $12,500 by reason of the operation of the said premises as a bulk oil distribution plant. This is in the presence of the lawyers for Cities Service.

MR. COLIN: It was owned by Cities Service, but you can't bootstrap that single word "their" into an obligation in this lawsuit.

THE COURT: The defendants shall submit to the Court plans to eliminate the discharge or runoff of petroleum from the premises onto the land over lakes of the plaintiff.

That squarely puts on Cities Service an obligation to be a participant in preventing future harm to the plaintiff, and the jury could so find.

MR. COLIN: I think your Honor has constructed a contract that was not made between the parties, nor claimed here in the lawsuit.

May I continue, your Honor?

THE COURT: I don't really know that you need to. As far as I am concerned, that is the absolute bottom line of your motion to dismiss the claims. Being aware of these facts and believing that this is a jury issue, I do not see how you can attack this. You don't touch these issues. I don't see that there is anything really to argue. It is for the jury to determine.

MR. COLIN: I would like for the record to direct to your Honor what I believe to be the controlling law. I have already adverted to the facts, namely that everything

factually that is claimed to have resulted in the discharge of oil was an act or an omission of MGO.

THE COURT: I think the jury could find that by this agreement you had undertaken a duty to see to it that further harm was avoided, or at least minimized, and that there was a failure to perform that duty.

We have had testimony here that it was oil drippings as usual at MGO following this agreement. In fact, right during the time it was being negotiated there were oil drippings as usual.

The jury could conclude that shows a certain lack of good faith on everybody's part to be negotiating in court one way while the operation of the plant is continuing in the same way. Oil traps were clogged with snow and ice. Somebody should have been around there on a daily basis clearing the oil traps.

MR. COLIN: May I point out, your Honor, that this stipulation of settlement referred to filing plans for doing work and either doing the work or abandoning the plant. There is nothing in here that relates to an assumption of obligation by Cities Service to clear snow and ice from gutters on the property that MGO operated, to see that the oil traps didn't become clogged, as proof in this case suggests that they did. There was no such

assumption of obligation under this agreement.

THE COURT: We disagree on that. I deny you the motion to dismiss all counts.

Let's go on to the punitive damage claim.

MR. COLIN: May I at least, for the record, cite --

THE COURT: Read into the record the authorities that you believe call this to my attention, but I believe this is a factual matter and not a legal matter at this time.

MR. COLIN: I refer, your Honor, to Putnam v. Stout, 38 N.Y. Second. 607, decided in February 1976, which says --

THE COURT: Just read the authorities.

MR. COLIN: I refer your Honor to Cullings v. Goetz, 256 N.Y. 287.

THE COURT: Do you have photocopies of those?

MR. COLIN: Yes.

THE COURT: Submit them to me. I will consider them during the first recess, and if there is any reason to change my mind I will be happy to announce that to you.

MR. COLIN: I also hand up to your Honor the Restatement on Torts, and particularly Section 377.

THE COURT: Now for the punitive damages.

It is almost five minutes after ten.

MR. COLIN: On the punitive damages I refer your Honor to the case of Roginsky v. Richardson-Merrell decided by the Second Circuit in 1967, where the Court said that New York does not impose punitive damages on a corporation unless the officers or directors, that is the management of the company, either authorized, participated, consented to, or after discovery ratified the conduct giving rise to such damages.

That rule was given reiteration in Koufakis v. Carvel 425 F. 2d, 892, also a Second Circuit decision in 1970.

The Court also said: "The recklessness that will give rise to punitive damages must be close to criminality. Error in failing to make what hindsight demonstrates to have been the proper response, even gross error, is not enough to warrant submission of punitive damages to the jury."

I submit, your Honor, that where punitive damages were not allowed in a case such as Richardson, where a drug manufacturer was alleged to have released a drug without adequate testing with resulting serious side effects, it certainly would not be warranted on the facts of this case, or either the absence of sufficient gross reckless and

nearly criminal acts as to justify, or also absence of management approval of the acts or omissions.

THE COURT: That motion is denied.

On this record the defendants were on notice of the conditions at the Monticello plant causing injury to the plaintiff's property by reason of the fact that there was not only a lawsuit, but they paid money in settlement of that lawsuit. Under those circumstances it seems to me that the jury could find a clear duty to operate the plant in a much more careful manner than the testimony would seem to indicate, to minimize, or to completely avoid such damage in the future; and, according to the record, as the jury could find, no such effort was made whatsoever to improve conditions, and it seems to me it is a jury question as to whether punitive damages should be awarded under these circumstances if bad faith could be foundin both the negotiating agreement and the subsequent conduct, having been made fully aware of the conditions that existed and the damages that flowed from it.

That motion is denied.

I do not think the plaintiff is moving here to set aside the release in a strict sense. You say there is a cause of action. I think what the plaintiff is saying to you is that this release is part of an overall package,

and there is some evidence that the jury may consider in considering the defendant's subsequent conduct.

Am I right about that?

MR. ORSECK: Yes.

THE COURT: You are not asking that this release be voided so you may go for damages prior to that time?

MR. ORSECK: With respect to the release and the stipulation of settlement, it is the plaintiff's contention in this lawasuit that the release released claims prior to April 25. The only attack made on the release is the attack on the subsequent document.

THE COURT: The subsequent instrument, that's a jury question. I do not think there is a motion that needs to be addressed to that.

MR. COLIN: Your Honor, may I furnish you the citations on what I consider to be the relevant authorities?

THE COURT: Very good.

MR. COLIN: Drachler v. Foote, Supp. 9, 77; Nelson v. 500 Fifth Avenue, 73 N.Y. Supp., 299; Assurance Company of American v. Pulin, 142, N.Y. Supp 2d, 809; 37 N.Y. Jurisprudence, page 526, Section 7; 6 N.Y. Jurisprudence, page 590, Section 43.

THE COURT: Turning to the $100,000 diminution of value --

MR. ORSECK: Your Honor, I really didn't intend to interrupt the Court, but I believe by a short amendment, the identical amendment, three identical sentences, that problem can be cured.

THE COURT: What you are saying is that the allegation means that you have been damaged by the trespass into the future.

MR. ORSECK: For instance, the first cause of action in nuisance, they are all the same when it comes to damages. The complaint says that plaintiff has sustained permanent damages by way of diminution of value in the sum of et cetera. It is the plaintiff's intent at the end of the case to amend that paragraph to say that plaintiff has sustained damages in the sum of $100,000.

MR. COLIN: Your Honor, I say to that that there is a clear allegation of $100,000 alleged damage related to diminution in value of the premises. The words are clear and unmistakable; they cannot be turned to any different meaning, and there is no proof in the record in support of that.

THE COURT: But during the course of this trial we have received evidence, and I can remember about two or three days ago making a statement here without anybody disagreeing with me that the plaintiff's case consisted of

pgem

a claim for the expenses of removing the bottom of the lake and substituting new earth, and for the loss of rental income on the cabins. That is the claim we have litigated.

MR. COLIN: Not diminution in the value of the premises.

THE COURT: That's correct, sir. I will permit the complaint to be amended to state that claim which is in effect stated in the second cause of action on trespass where they say the trespass will be continuous and permanent in the future and plaintiff has sustained permanent damages. Inartistic it may be, but we have litigated the clear issue and everybody all through this trial has been litigating on that basis. I will grant the motion to amend the complaint to conform to the proof we have taken.

MR. COLIN: To which proof?

THE COURT: The proof of damage, that being the $21,000 for the bulldozer operation and however many thousands of damages it is claimed were occasioned by the fact that Mrs. Huss could not rent her cabins for as much as she could have had the oil not been on the lakes, et ceter.

Mr. Edison spent quite a bit of time testifying to the difference in her rentals and the rentals of a

comparable character. That was an area of proof that we took.

MR. COLIN: As to that, if my recollection is correct, there was no proof whatsoever which ascribed the difference between what was collected as rent at Doralee and what was collected as rent at these other colonies to any oil present on the premises.

THE COURT: He said they were comparable bungalows, and this is what other people got for comparable bungalows.

Plus there is Mrs. Huss's testimony as to what she got. That is before us. I am permitting the pleadings to be amended to conform to that proof. I do not think anybody is urging here that there has been a diminution in value of the property.

Am I correct?

MR. ORSECK: That's correct, your Honor.

THE COURT: So that is out.

MR. COLIN: That's the end of the Cities Service motions, your Honor.

I would make one request before the jury comes out, your Honor. You indicated that you would limit our continuing examination to the question of the leases made and matters relating to the leases, and I intend to do that;

1 pgem

2 however, I have learned just in the last couple of days --

3 I think it was on the weekend -- that Doralee has another

4 suit presently pending covering the same period of time

5 as this suit involved where it is alleged that the acts

6 of the defendant impaired the rental value of Doralee,

7 and I would like to elicit that in cross-examination of

8 Mrs. Huss as well.

9 THE COURT: Where do you learn this suit

10 allegedly is?

11 MR. COLIN: Sullivan County Supreme Court.

12 THE COURT: It covers the same ground?

13 MR. COLIN: The Doralee premises and alleging

14 that the acts of the defendant in that case impaired the

15 rental value of the premises.

16 THE COURT: I do not see that there is any

17 objection to that. What difference does it make if she

18 has brought the same suit elsewhere except to show she

19 is engaging attorneys to do it?

20 MR. COLIN: If she is complaining that some-

21 one else impaired --

22 THE COURT: You say the defendants.

23 MR. COLIN: No, no. The defendants in the

24 other suit, not these defendants, not the defendants in

25 this court. She has another suit against the Village of

pgem

Monticello alleging certain acts in that suit which she claims had the effect of impairing the rental value of Doralee premises.

THE COURT: That would be corporate injury. You may inquire.

MR. ORSECK: I have a couple of matters too, your Honor.

THE COURT: Is this housekeeping, or what?

MR. ORSECK: It really is not. It pertains -- it is by way of motion.

THE COURT: Can you hang on to your motions for a bit here because I want to get the jury under way. It is a quarter past ten.

MR. GRUBBS: May it please your Honor, I would like to put my motion on the record.

THE COURT: I don't know that you have any standing at this point to move for anything.

MR. GRUBBS: I want to make sure that I do everything possible to protect my client, and that is why I would like to make it.

THE COURT: Are you joining?

MR. GRUBBS: It will be a rather short motion.

THE COURT: Go ahead.

MR. GRUBBS: May it please your Honor, on behalf

1 pgem

2 of the third party defendants, MGO Corporation and Monticello
3 Gas & Oil Company, Inc., I respectfully move to dismiss the
4 complaint of the plaintiff Doralee Estates, Inc. on all the
5 grounds stated by counsel for the defendant Cities Service
6 Oil Company, and on the further ground that in the first
7 and third causes of action it is alleged that the plain-
8 tiff's property had been rendered unfit for use, and the
9 proof in this case is all to the contrary. In fact, the
10 proof is that the rentals were almost complete, and that
11 the income has been higher in the last few years than it
12 was previously.

13 My second additional ground is that the
14 second cause of action alleges diminution of value of prop-
15 erty, but as the Court has already indicated there has been
16 no proof of that in this.

17 With respect to the third cause of action,
18 the plaintiff's complaint alleges a separate cause of action
19 for punitive damages. The evidence in this suit fails to
20 establish any malice attempt or evil intention to harm any-
21 one, and the evidence is completely devoid of establishing
22 any deliberate evil motive on the part of the defendant or
23 the third party defendant to injure the plaintiff.

24 My authorities are, your Honor, as follows:

25 Gostkowski v. Roman Catholic Church, 262 N.Y.

3220; Service v. Rolnick, 67 NYS 2d 657, affirmed at 71 NYS, 2nd, 892; Walker v. Sheldon, 10 N.Y. 2d, 401, 179 NE. 2d 497; Gordon v. Nationwide Mutual Ins. Co., 37AD. 2d 265; and Boomer v. Atlantic Cement, 72 Misc. 2d 834, affirmed 420 AD 2d 496.

#20 Finally, your Honor, I move to dismiss the eighth cause of action because the eighth cause of action, as your Honor said, neither has set forth a cause of action in rescission or reformation, and, therefore, I respectfully submit there is no evidence in this case to give to the jury a legal basis for altering any documents executed pursuant to the earlier agreement.

THE COURT: Your position is noted and any motions are denied.

Incidentally, the fact that the case does not proceed on the diminution of value does not mean that one could not conclude that there had been a diminution of value, but just that the plaintiff is not proceeding on that theory. We have had no proof on that theory, but I would assume that a lake bottom that has oil in it diminishes in value. Nobody has given us any proof of what the land was worth before or what it is worth now, so we have no specific proof, but I did not mean by any means of ruling to indicate that I did not feel there was a diminution of value. I just want to

say that that is not the theory that the case is proceeding on and it is not being given to the jury on that theory.

Bring the jury in.

(Jury in box.)

(Continued on next page.)

2 D O R A H U S S, resumed.

3 THE COURT: You are still under oath.

4 CROSS-EXAMINATION (Continued)

5 BY MR. COLIN:

6 Q Mrs. Huss, you had a tenant named Thau in

7 1974, did you not?

8 A The name is familiar. If it says 1974, yes.

9 Q Thau was a tenant for several years before

10 1974?

11 A I don't know. I would have to refer to the

12 leases.

13 Q You had a tenant named Dente in 1974, did you

14 not?

15 A The names are familiar but unless I refer to

16 the leases -- they reflect the names and years.

17 Q Do you remember Dente as a tenant in prior

18 years to 1974?

19 A I sould say so, yes.

20 Q You had a tenant named Weinstein in 1974?

21 A I'm not sure about the year. If it says so,

22 I accept it.

23 Q And did you have the same Weinstein in years

24 prior to 1974?

25 A I don't know about years. Maybe one or two.

MR. ORSECK: I object, your Honor, on the grounds only of repetition. I am sure the Court and the jury will recall that Mr. Colin asked the witness and she testified, my memory serves, that at least half of the tenants from '65 up to '74 were repeat. That being the case and that being the concession, it would seem that this line of inquiry is strictly repetitious.

MR. COLIN: My recollection is that this witness' last question and response when we adjourned on Friday was that there was not a single tenant.

THE COURT: Objection overruled. You may proceed.

The jurors' recollection will govern as to what the testimony was and has been throughout this trial.

Q You had a tenant named Schickler in 1974, did you not?

A No.

Q Sure of that?

A Positive.

MR. ORSECK: I object, your Honor, on the grounds that Mr. Colin -- I will choose to be charitable -- misrepresented by appearing to be reading from a document. The documents he read were these people in '74, they were not. That to me is unfair or inadvertently erroneous

cross-examination.

MR. COLIN: May I ask that Mr. Orseck not interrupt examination on my part as frequently as he has done throughout this trial.

THE COURT: Let's go forward. Put the questions.

MR. ORSECK: I have an objection before the Court, your Honor.

THE COURT: I will overrule that objection. Let's go forward.

Mr. Colin, I would ask this: I assume this inquiry is going to go to the amount of rentals and not merely the fact that there were certain names mentioned on lease rolls.

MR. COLIN: This inquiry, your Honor, will go to the credibility of this witness and the truthfulness of her testimony.

THE COURT: I know, but if you are asking her about the names of people --

MR. COLIN: She testified last Friday with respect to repeaters.

THE COURT: Let's get to that.

MR. COLIN: I am inquiring about repeat tenants as to years which she said she had none.

THE COURT: I don't want the reading of names in a vacuum here.

MR. COLIN: I have had all of these leases examined and collated and I am reading from notes based on that.

THE COURT: Proceed.

MR. ORSECK: I would read just in the interest of --

THE COURT: Let's not get into this.

MR. ORSECK: He is reading from the wrong year --

THE COURT: Let's not get into this.

(Pause)

MR. COLIN: I ask the clerk to mark this for identification.

*** (Defendant's Exhibit W marked for identification.)

Q Mrs. Huss, I show you Defendant's Exhibit W for identification and I ask you whether that's a copy of a lease of unit 9 in the Doralee bungalows that your counsel furnished to me.

MR. ORSECK: I object to the form of the question. It's not whether or not I furnished, it's whether or not it was a lease.

THE COURT: Overruled.

A This is a copy dated August 14, 1973, with a deposit of $50 for the year 1974 by Mr. and Mrs. Arthur Schickler, which was later canceled as well as every other tenant. She did not come to the Doralee Estates as a guest in the year '74.

MR. COLIN: Just a second.

MR. ORSECK: She has to explain the document. Don't say just a second.

THE COURT: An answer may stand.

Q Did Mr. Schickler occupy unit 9?

MR. ORSECK: What year?

Q 1974.

A In 1973.

Q And 1974 he did not?

A That's correct.

Q Did someone else occupy that unit?

A Yes, but not one of the old people.

Q Did Mr. Guadagno occupy unit 12 in 1974?

A No, sir.

Q Mrs. Huss, did Iskowitz occupy unit 2 in 1974, '75 and '76?

A Yes, sir.

Q So if you said there were no repeaters in '75 --

THE COURT: Don't characterize it that way.

The jury will disregard anything implicit in that question.

Q Mrs. Huss, did Shapiro occupy unit 3 in 1974, '75 and '76?

A Yes, but these are new people beginning in 1974.

MR. COLIN: I move to strike the latter part of that answer.

THE COURT: That motion is denied.

Q Mrs. Huss, did Schoen occupy unit 4 in 1974, '75 and '76?

A Yes, sir, but not before '74.

MR. COLIN: I move to strike the latter.

THE COURT: Motion denied.

Come to the side bar.

(At the side bar)

(Continued on next page.)

THE COURT: The reason I am denying these motions to strike is that implicit in that question to which I sustained an objection was an attempt to impeach her statement that there had been no repeaters after 1973, and the jury could have so concluded. That is what you were trying to show that she was not telling the truth on that subject. Therefore, I am allowing these answers to stand for that reason.

(Continued on next page.)

(In open court)

Q Mrs. Huss, was L. Friedman the occupant of unit 5 in 1975 and 1976?

A Yes.

Q Was R. Friedman the occupant of unit 6 in 1975 and 1976?

A Yes.

Q Was Benedek the occupant of unit 7 in 1975 and '76?

A I don't believe Benedek was there in '76.

Q You have the name as one of your occupants.

A Yes.

MR. COLIN: I ask the clerk to mark this paper for identification.

*** (Defendant's Exhibit X marked for identification.)

Q I show you Defendant's Exhibit X for identification, Mrs. Huss. Does that bear the signature of Benedek?

A Yes. Dated August 15, 1975, for the year '76, but Benedek --

Q Does it cover the occupancy year 1976 season?

A This lease was drawn up in August of 1975. Benedek did not occupy this bungalow in the year '76.

Q Will you look at the document. It has a date when it was drawn up; is that right?

A Yes. August 15, 1975.

Q So on August 15, 1975, Benedek was occupying that unit for the season of '75, was he not?

THE COURT: Overruled.

A Yes.

Q He was occupying in '75?

A Yes, sir.

Q And he came to you and said in effect, "I want to renew in '76"?

A Yes.

Q You drew that paper which you have in your hand, which is the lease for '76, is that right?

A Yes.

Q And you gave it to Mr. Benedek to sign?

A Yes.

Q And he signed it?

A Yes.

Q And he gave you a deposit; is that right?

A Yes.

Q So now my question is: Did he occupy the premises in 1976 for which he signed a lease and gave you a deposit?

A No.

Q Did someone else occupy the premises?

A Yes.

Q Who occupied the premises?

A I don't remember the name.

Q Did you draw a lease for the person that you say did occupy that unit in 1976?

THE COURT: I think you have no foundation at this point to ask that question. I sustain the objection.

MR. COLIN: I think the foundation is the statement that someone other than Benedek --

THE COURT: She said the other day sometimes she drew the leases and sometimes she didn't. Since you can't identify who occupied it, you have no basis for asking her.

MR. ORSECK: The plaintiff offers to agree for '74, '5 and '6 there were about 80 percent return occupancy for those years. I make that offer to save time.

THE COURT: That has nothing to do with this area of interrogation.

Objection is sustained.

Q Was there a written document evidencing the occupancy in 1976 of unit 7?

A I am not sure.

Q Did you generally draw written lease documents for your units?

A Sometimes, or sometimes this particular one might serve as a substitute for the other occupant.

Q Do you know whether you did or did not draw a lease for this unit in '76?

A I don't know.

Q Do you have a lease with someone other than Benedek --

MR. ORSECK: Don't call on me in the presence of the jury, number one. I have given you everything. Your associate has it. This seems to be a memory test.

THE COURT: I don't want colloquy. Please, counsel.

MR. ORSECK: Yes, sir.

Q Mrs. Huss, did a family named Spitz occupy unit number 8 in 1974, '75 and '76?

A I believe so.

Q Did a family named Fisher occupy unit 9 in '75 and '76?

A Possibly.

Q Did a family named Weil occupy unit 10 in '75 and '76?

A I think so, yes.

Q Did a family named A. Kleinbart occupy unit 11 in '74, '75 and '76?

A There were two Kleinbarts.

Q I will get to the other one.

A I am not sure which is which. One came back the next year and the other one did not. I cannot identify it by bungalow number.

Q You do remember at least that some family named Kleinbart occupied for more than one year; is that right?

A Yes.

Q Did the family named L. Kleinbart occupy unit 12 for the years '75 and '76?

A No, I don't believe 12 was occupied by Kleinbart in '76.

*** (Defendant's Exhibit C marked for identification.)

Q Mrs. Huss, I show you Defendant's Exhibit C for identification. I ask you whether that is a lease document for the season of 1976.

A Signed in August of 1975, yes.

Q Did these people who signed it say to you in the 1975 season that they wanted to renew for '76?

A Yes, but it gives --

Q Answer my question.

A The answer is yes.

Q Did you draw that document which you have before you, Exhibit 5?

A Yes.

Q Did the Kleinbarts sign it?

A Yes.

Q You put it in your files, didn't you?

A But they didn't come in 1976.

Q They did not come in 1976?

A No.

Q Did they forfeit the $100 deposit they gave you?

A Forfeit it? No. It was absorbed by the people who did occupy it, named Friedman. They returned the deposit to Kleinbart.

Q What was the first name of the Friedmans who occupied that?

A I don't remember. We have a few Friedmans and I cannot give you the first name. Their name and address is at the bottom of the lease.

Q Did you have a family named P. Friedman occupying unit 15 in '75 and '76?

A I believe so.

Q Did you have a family named Deitel occupying unit 16 for 1974, '75 and '76?

A Yes.

Q Did you have a family named Schenkolowsky occupying unit 17 in 1975 and '76?

A Yes.

Q Did you have a family named Saffer occupying unit 18 in 1974, '75 and '76?

A Yes.

Q Did you have a family named Brecher occupying unit 19 in '74, '75 and '76?

A Yes.

Q Did you have a family named Goldstein occupying unit 20 in 1974 and 1975?

A Yes.

Q Did you have a family named Margareten occupying unit 21 in 1974 and 1975?

A Yes.

Q Did a family named Hartstein occupy unit 23 in 1975 and unit 20 in 1976?

A Yes.

Q Did a family named Stein occupy a trailer for the years 1975 and 1976?

MR. ORSECK: I object. May I make the objection

at the side bar?

THE COURT: All right.

(At the side bar)

(Continued on next page.)

MR. ORSECK: Your Honor, the reason for the objection is that there are twenty-three bungalow units as such. Everything from hereafter -- there are another couple of units: There is a trailer for which we are not making any claim because there is nothing comparable, and in the main house there are some apartments, and while there have not been any increases it would seem to be wasteful -- they would have no probative value in the case at all.

THE COURT: What are you getting at with this proof?

MR. COLIN: Your Honor, if people are coming back to these premises then these premies must be quite satisfactory, and that is in rebuttal to the representation of what is contended by the plaintiff, that these premises were degraded by the conditions for which they are suing.

THE COURT: I can see that's a permissible question. The question is: What price are they coming back at? That's the argument on the other side. You may continue.

I assume you are not going to get off to the occupancy of any quarters as to which there is no proof of comparability.

MR. COLIN: I don't think it makes any difference. If a man who rented a trailer in one year comes back to rent it another year, and a man who rents it in the main

house comes back another year, he is saying that these premises are acceptable to him. I think it is --

MR. ORSECK: They are all-year rentals. They changed from year to year. It does not make any difference.

THE COURT: I think Mr. Colin is entitled to argue this point, whether it is valid or not, because, as I say, the question is not only did they come back but at what price. If this is a unit that could have been rented for $1,000 and they kept coming back because it was $700, then that's Mr. Orseck's argument. Your argument is that they kept coming back, and his argument is that they kept coming back and they didn't have to pay as much.

You are entitled to develop that point, in any event.

(Continued on next page.)

(In open court)

Q Mrs. Huss, did a family named Stein rent a trailer from you in 1975 and in 1976?

A Yes.

Q Did a family named Hasenfeld rent main house number 1 from you for 1975 and 1976?

A 1975, yes; and I believe prrt of the season of 1976.

(Defendant's Exhibit S marked for identification.)

Q I show you Defendant's Exhibit S for identification and I ask you whether your signature appears on it.

A Yes

Q Do you also identify the signatures of Brecher and Schon that appear on it?

A Yes.

Q Did you receive a payment of $5,000 at the time that document was signed by the parties?

A I believe so, yes.

Q Did you rent 22 bungalows by that document to Messrs. Brecher and Schon?

A Yes.

Q Did you receive the sum of $16,535 for the

rental of the 22 bungalows?

A The total, yes, inclusive of the $5,000.

MR. COLIN: I ask that that be marked in evidence.

THE COURT: Any objection.

MR. ORSECK: I have a voir dire question. I can save it for redirect.

THE COURT: Do it.

MR. ORSECK: I would have no objection.

THE COURT: It will be received.

(Defendant's Exhibit S received in evidence)

Q Mrs. Huss, did Doralee Estates, Inc., institute a lawsuit in the Supreme Court of the State of New York, Sullivan County, against the Village of Monticello?

A Yes.

Q Was that lawsuit one in which Doralee Estates was represented by Mr. Orseck here?

A Yes.

Q Were you examined under oath in that lawsuit in a deposition before trial?

A Yes.

Q Did you testify under oath in that deposition that --

MR. ORSECK: I object --

THE COURT: At this point I see no basis for reading testimony in some other proceeding.

MR. COLIN: I am not reading.

THE COURT: You were paraphrasing. I see no basis for that. I sustain the objection. There is no foundation for going into this. You may ask questions of this witness about facts at this point.

Q Were your units fully rented in the year 1972?

A Yes.

Q Did the action that you brought against the Village of Monticello involve certain construction work done by them in and about the Doralee premises?

MR. ORSECK: At a certain date, and I would not object.

THE COURT: You may answer. If this is something that does not come out, you may deal with it on redirect examination.

A Yes.

Q Did you claim in that action that the work done by the Village of Monticello was causing an impairment of your rents and an interference with your tenants?

A Interference with my tenants insofar as they worked into the summer season and they were not supposed to.

Q Did you claim that that interference impaired

your rents and your ability to collect the full and fair rent for your premises?

MR. ORSECK: Your Honor, I think the objection as to time is a valid one.

THE COURT: I think we should establish when this is.

MR. COLIN: My next question would have been for what period.

THE COURT: When is this?

MR. COLIN: I don't see how I can ask that --

THE COURT: You are talking about a claim. What's the time involved in the claim?

MR. COLIN: She has not answered my question --

THE COURT: But some time back it was asked about the time. The time has come to establish the time.

Q What years if any did you claim that your ability to collect your full rental value was impaired?

THE COURT: By reason of --

MR. COLIN: By reason of the acts of the defendant the Village of Monticello.

MR. ORSECK: The form is objectionable. I don't want to argue it in front of the jury.

THE COURT: I will overrule it.

A It was not for years. It was for a part of 1972 when they worked into the summer months. My people didn't like it.

Q Is that all the period for which you make claim?

A Perhaps not originally, but we discussed amending the claim.

Q What did you originally claim?

A I don't recall the exact legal --

Q What years did you originally claim that your ability to collect the full rent was impaired?

A I don't remember exactly

Q Did you read the bill of particulars that was filed by your attorney in this suit against the Village of Monticello?

A I have not read it recently, no.

Q You did read it at the time it was prepared?

A At one time, yes.

Q I ask you, Mrs. Huss, whether you read this, reading from Section 6 --

MR. ORSECK: May I see it before it's read, your Honor?

THE COURT: Why don't you look at it so we have no problem.

You believe sometime you looked at that?

THE WITNESS: Yes.

(Pause)

Q My question is: Did you read the following from paragraph 6:

"In addition thereto, plaintiff" --that's Doralee --"will claim loss of rents and revenues for the year 1972 in the sum of approximately $3,000 for the year 1973 in the sum of approximately $1,000, and for the year 1974 in the sum of approximately $1,000."

Did you read that?

A That's in reference to the poor resurfacing of the road.

Q Did you read that language?

A Yes.

Q Did you make that statement under oath in this sworn bill of particulars?

A I'm sure I did, yes.

MR. COLIN: I ask that this be marked in evidence.

MR. ORSECK: She acknowledged --

THE COURT: Do you have an objection?

MR. ORSECK: Yes.

THE COURT: At this point it is sustained.

MR. COLIN: May this be marked for identifica-

tion in connection with your Honor's ruling.

*** (Defendant's Exhibit AA marked for identification.)

THE COURT: I would admit it to the extent she has read it, but not beyond.

MR. COLIN: That's the only purpose for which it is offered.

THE COURT: Since you have read it, it's in the record and there is no need for the exhibit.

Q Was the basis of your claim in this lawsuit against the Village of Monticello that the work was done during the summer season and that debris was scattered around the premises and the working equipment, the machinery was on your premises and your tenants were disturbed; is that your claim?

A For a part of the summer, about two weeks.

THE COURT: This is 1972?

THE WITNESS: Yes.

Q That's all the claim you have?

A The noise of the equipment for two weeks of a summer vacation is an awful lot within an eight-week period.

Q You say that your claim against the Village of Monticello was for something that happened for two weeks in 1972?

A Yes, plus the bad resurfacing of the roads and on inspection by the federal government senior engineer, the agency that provided the funds for this work, they did not comply insofar as restoring my property to its prior --

Q Mrs. Huss, was work done in 1973 by the Village of Monticello?

A Perhaps part of '73. I don't recall the exact date.

Q It was not '72 alone. It was into '73 at least to some extent?

MR. ORSECK: I object.

THE COURT: Sustained. Let's go at this afresh, please.

Q Do you now say, Mrs. Huss, that the work was in '72 and '73?

A I'm not sure of the dates. I would have to refer.

MR. COLIN: May I have one moment?

THE COURT: You may.

(Pause)

Q Mrs. Huss, in connection with the work that was done by the Village of Monticello, I ask you whether that work was done with your approval, meaning the whole project? That was something you agreed to, was it not?

MR. ORSECK: It's irrelevant, your Honor. If we get into that lawsuit I will be two days on redirect.

THE COURT: I will sustain that.

Q Did you receive compensation from the Village of Monticello to do the work they did?

THE COURT: Compensation for work?

MR. COLIN: For permission to do the work.

THE COURT: I'll sustain that.

Q Mrs. Huss, in the course of the work done by the Village of Monticallo, did you give the Village permission to fill in your lower lake with earth?

A Yes.

MR. COLIN: No other questions.

CROSS-EXAMINATION

BY MR. GRUBBS:

THE COURT: Is this within the ambit of what we left open?

MR. GRUBBS: The rental income.

THE COURT: That's with respect to the materials that were furnished over the weekend?

MR. GRUBBS: What was gone into, your Honor.

THE COURT: Proceed.

Q Mrs. Huss, in that suit against the Village of Monticello, did you allege that they did work during the

period between May 1 and September 1, 1972?

A For about two weeks, I believe.

Q Did they do work during that period? Tell us when they did work.

A I don't remember just when, but I know they worked into part of the summer season.

Q I would like to read the paragraph 3 of the bill of particulars that you indicated you had signed.

MR. ORSECK: I object on the grounds that it's a pleading and it refers, those dates refer to documents and it does not help the jury and does now show any inconsistencies.

THE COURT: Come to the side bar.

(At the side bar)

(Continued on next page.)

THE COURT: Let me see what you propose to read.

MR. GRUBBS: Surely. It is paragraph three, your Honor.

(Pause.)

MR. ORSECK: The agreement says that no work shall be done between May and September, and the bill of particulars says that work was done between May and September.

MR. GRUBBS: It speaks for itself. This is not just a pleading. This is a sworn bill of particulars.

MR. ORSECK: That's right. Yes.

THE COURT: What are you going to argue from that?

MR. GRUBBS: She said --

THE COURT: She says the exact date is within the knowledge of the defendant. Where does that get you?

MR. GRUBBS: I want to show the scope of the work --

MR. ORSECK: The agreement that was reached says there will be no work between that period.

THE COURT: This is really a collateral matter and this is a non-impeaching aspect. How does that advance you? If you have something here that has some meat in it I will permit it.

will permit it.

MR. COLIN: If someone else damaged --

THE COURT: There is no question about that. She has testified that it was two weeks during the summer, and all this says is that it happened over the summer.

MR. COLIN: May to September.

MR. GRUBBS: She could have put in her bill of particulars for two weeks. She makes it from --

THE COURT: She says it happened within that period. It says during the period between May 1st and September 1st. The exact date the work was permitted is within the knowledge of the defendants. I see nothing --

MR. COLIN: She has testified with respect to four months.

THE COURT: She says it occurred within that four-months period.

I sustain the objection.

(Continued on next page.)

(In open court)

Q Mrs. Huss, in addition to the suit that you are maintaining against the Village of Monticello, did you also, as Doralee Estates, Inc., commence a lawsuit against Harvey Road Realty Corporation, Jerge Asphalter, the Cross Construction Corp.?

A Yes.

Q In that suit, did you claim that they damaged the use of your property as a bungalow colony?

A They destroyed a well with dynamite basting. I had to drill a new well.

Q Did you subsequently amend that complaint in that lawsuit to claim additional damages?

A I don't recall, but I know that it was the major problem.

Q When did this occur?

A I don't remember the exact dates.

Q Were you compensated for that damage?

MR. ORSECK: I object, your Honor. We don't know when it was. I don't know when it was. Suppose it was in 1950?

THE COURT: She has brought a lawsuit because dynamite blasting damaged a well.

I sustain the objection. Proceed.

Q Mrs. Huss, isn't it true that --

MR. ORSECK: Unless we have a date --

THE COURT: Counsel, please. You don't even know what the question is.

MR. ORSECK: I move for the Court to instruct the jury to disregard the question itself.

THE COURT: We have not gotten any of it.

MR. ORSECK: The question the objection to which was just sustained.

THE COURT: That doesn't seem to me to make any difference either way.

THE COURT: Counsel, come back here.

(At the side bar)

(Continued on next page.)

THE COURT: On Friday I gave leave to defense counsel to further cross-examine this lady upon receipt of certain leases. On Thuesday morning Mr. Colin and I specifically made it clear, and everybody agreed, that that was all that the cross-examination was to consist of upon the continuation. This morning Mr. Colin came in and said that Monticello, the Town of Monticello had been sued for damage to her property. I deem that to be an appropriate area of inquiry and that it warranted him going beyond the limited scope of examination. You have gone into dynamite damage to a well. I don't want to get into any litigating of that. It has nothing to do with our case at all.

What else is it that you propose to go into? I ask you this question because anything other than what we have already covered is beyond the scope of the limited leave that I gave, and I want to know what it is. I don't want to get into any more well dynamiting areas here.

MR. GRUBBS: The last question went directly to the income of the last three years. The objection was made. I took that opportunity to take a look at this to see what it was. I am going into that.

THE COURT: You may get into that.

(Continued on next page.)

(In open court)

Q Is it fair to say that during the year 1974 and 1975 and 1976, in each of those succeeding years the rental income from Doralee Estates rental have increased?

A No, I don't think so.

Q Let's take it year by year. In 1974, was the gross income rentals received by Doralee Estates in excess of $16,535?

A You are not combining the gross income to the 23 bungalow units.

Q I am talking about the annual receipts.

MR. ORSECK: Your Honor, unless we are talking about apples or pears --

MR. GRUBBS: Oh.

MR. ORSECK: Don't say "Oh," because I have a valid objection before the Court.

Q You have been in business for how many years?

MR. ORSECK: Objection. This has been gone into.

THE COURT: Overruled. Proceed.

A Since 1965.

Q You know what I mean when I say "gross income from the operation of the Doralee Estates." That means all the income you received with respect to rental, both

winter and summer.

A It could mean laundry room income too.

Q I am talking about total income from rent.

THE COURT: I think everybody understands that.

Q Didn't you tell Mr. Colin that from one lease arrangement alone in 1974 you realized $16,535?

MR. ORSECK: That's a bad characterization. I would object to the form of the question.

THE COURT: Overruled.

A Yes. But it did not represent what I had to for that 16,000 whatever.

MR. GRUBBS: I move to strike as not being responsive to the question.

Q In 1975 was the gross rental income from the operation of Doralee Estates $20,450?

MR. ORSECK: Your Honor, I realize that counsel has a right to conduct his own examination.

THE COURT: Can't you handle this on redirect?

MR. ORSECK: I can.

Q Isn't that true?

A Again, it does not represent the same number of bungalows for the same things given.

MR. GRUBBS: May I ask that the witness be directed to answer a simple question on gross rental income

from the operation --

THE COURT: I think she said "yes but."

Am I correct in that?

A Yes.

Q Is it fair to say in 1976 the gross rental income from the operation of Doralee Estates was in the sum of $21,120?

A It does not sound right, no.

Q Do you know whether it is or is not right?

A I believe it's excessive. Your figure is excessive.

Q Did you bring your income tax returns for those three years with you today?

A I didn't do last year's income tax yet.

Q Do you have 1975?

MR. ORSECK: We don't have any here.

Q Don't you have your books for 1976?

MR. ORSECK: Your Honor --

THE COURT: I sustain that. There was no call upon her at this point to bring those. She was not asked to bring those.

MR. ORSECK: Those documents were examined during the depositions by Mr. Colin and we boil down to we're going to finish today. I have two small briefcases.

Q Is it fair to say that you have no books or records in court that --

THE COURT: No, counsel. This is an inappropriate question in my opinion as of this moment.

MR. GRUBBS: May it please your Honor, I offer in evidence the least agreements for the year 1976.

MR. ORSECK: Your Honor, there certainly is an objection. When he says "lease agreements for the year," that's a representation. I have a representation too. There were lots of duplicates that are obvious in discovery we gave everything. When he makes the offer, if he's offering what it was, I'll consent. But they ought to know about it by now.

Mr. Colin wrote me fifteen letters during the course of litigation to explain these leases.

MR. COLIN: I think Mr. Orseck is transgressing the privilege of the counsel. I think he has done it throughout this trial. Your Honor has indicated that redirect is the appropriate means of straightening out whatever he thinks --

THE COURT: Mr. Colin, he takes the position, if I can rephrase it for him, perhaps with a little less warmth than it has been vested with, he takes the position that there is no foundation on this record that each of these

leases represents a rented cabin in the summer of 1976.

MR. COLIN: On this record Mr. Orseck furnished each of these leases to us.

THE COURT: But he says that's not a representation to you that each of these leases was honored by the lessee in each case. Without that being established, they have become inadmissible for the purpose for which Mr. Grubbs is offering them. Mr. Grubbs is offering them to show the rental income from these cabins during 1976. According to Mr. Orseck there is no foundation that these leases represent that because there is no showing these people actually occupied the cabins and paid these rentals.

On that basis, I will sustain the objection on the record as it is presently established.

MR. GRUBBS: I am also offering it in evidence on the basis that these arethe leases that plaintiff's counsel furnished as being the leases that were in effect.

MR. ORSECK: Show me that. That's not so. You were not even there.

THE COURT: We have a dispute about that and I am not going to get into it.

I will mark these leases as being the ones that were executed as of the date it was indicated upon each. I will say to the jury I am admitting them in

evidence, but they do not, on this record, represent a showing of what the rental income is for '76, but there is no showing in this record that each and every one of those leases represents a cabin that was rented and fully paid for.

I think the jury will so understand at this point.

MR. GRUBBS: May I have each of those leases marked for identification?

THE COURT: They are being admitted. They are in evidence for the purpose of showing what was in fact executed, not for the purpose of showing what was received on them as income.

*** (Third-Party Defendant's Exhibit BB received in evidence.)

Q Mrs. Huss, I show you --

(Pause)

THE COURT: How many are there?

MR. ORSECK: 28.

MR. COLIN: They are out of order. In order to get a correct number, I have to have them in order. I am accounting for the unit numbers.

THE COURT: Count the number of the pieces of paper and that's all.

(Pause)

THE COURT: Mr. Grubbs, can you conclude your cross-examination and go forward, please.

MR. GRUBBS: Yes.

Q Would you be good enough to tell the Court and jury how many rentals Doralee had in 1976?

A 23 bungalows.

Q How many rental units, how about lease units?

MR. ORSECK: Excuse me. I know you keep chastising me about interrupting, but when she says 23, they don't have a number 13.

THE COURT: I know that. 23 units.

Q Tell us how many separate units you can rent, that you have facilities for in 1976.

A 28 in total.

Q Did that 28 include the three mobile units?

A That includes one mobile unit, two winter houses with two apartments in each one.

MR. ORSECK: When she says 23, your Honor, will counsel agree with me it's only 22 because there is no 13? There is no point in trying that issue in this case.

MR. GRUBBS: If your Honor please, the witness has been asked a simple question and she has given us a direct answer. I ask that there be no more comment about

her answer.

MR. ORSECK: Then we will do it in redirect.

THE COURT: How many do we agree?

MR. GRUBBS: 28 lease agreements.

Q Mrs. Huss, I show you these 28 lease agreements marked BB in evidence and I ask you if those lease agreements are for rentals in the year of 1976.

A Those represent leases signed at the end of the summer season of 1975 with anticipated rentals for 1976.

Q Look through those leases and tell us what if any rental unit space rented by those leases was not in fact rented in 1976.

A Was not rented or not rented to the parties?

Q Was not in fact rented to anyone, whether to that party or someone else.

THE COURT: The question needs more in it than that.

A This bungalow, bungalow 22, was not rented. It was not rented by Lander but it was rented for one month by another party. I don't remember the name.

Q Would you tell us what compensation you received for the rental for that unit for the month?

A I would imagine half of the total.

Q Do you know?

A No, not definitely.

Q Did you return the deposit?

MR. ORSECK: I object. This is just wrong.

THE COURT: Overruled.

What happened to the deposit?

A It was transferred from the party who gave the original deposit to the new party and they used it. I think the same thing applied to number 23.

Q Was number 23 rented to anyone else?

A Not for the entire season.

Q For what period?

A It would have been either July or August. I cannot tell you which month. And this was for half the season too.

THE COURT: Which one is that?

THE WITNESS: It's referred to here as number 26, but it's one of the apartments in the Schroeder House, which is one of the winter houses, and the total price is contained on this, $350.

Q Any other?

A Yes. This party switched from one apartment in the Schroeder House to another apartment.

Q Tell us what unit you are referring to and what unit they moved into.

A They originally rented this 26 for $650.

Q And they moved to where?

A They moved to the one for $840, which is a substantially larger unit, and I had to rent this $650 one for only part of the season for $350.

Q Who was renting that $800 unit before they moved into it?

A Nobody. It was vacant.

Q Mrs. Huss, is it fair to say that these 28 agreements that were marked as Defendant's Exhibit BB in evidence are agreements that applied to separate units comprising the 28 units of Doralee Estates?

MR. ORSECK: I object to the form. It's confusing.

THE COURT: Yes.

Q Is it true to state that each of these 28 agreements applied to different rental units when they were signed?

MR. ORSECK: I object. The question is unintelligible. I don't object to the subject matter, but I do to the form.

Q Do you understand the question?

A Are you saying that each lease represents a rental unit?

Q A different rental unit.

A Yes, I would say so.

Q Would it be fair to say that with the few exceptions you gave us, these in fact were occupied and paid for in accordance with the agreements?

A Not really. If you will notice, at the bottom of each agreement I have payment in full, "Payment in full must precede occupancy of" -- obviously this is emphasized since it is contained in the agreement. I had difficulty receiving payment from these people.

Q Did you eventually obtain payment from them?

A Well, some not even by the end of the season.

Q Is there any that you have not yet received payment from?

A In the past couple of years, yes.

THE COURT: Involving these leases?

THE WITNESS: No. I think I was eventually paid. Not entirely, no. I was not paid.

Q Pardon me?

A I was not paid in their entirety.

Q Tell us which of these renters did not pay you as he agreed to pay you.

A Well, Fisher did not --

Q What is his full name?

A I don't know. There is a contract there. He didn't pay for playground equipment that he had agreed to chip in with with the rest of the people.

Q What was the amount he owed you, he now owes you and has not paid?

A It's a pro-rated amount that is not contained here.

THE COURT: Tell us all these payments you did not receive and then we can go into details.

Q May we have the name of the person, the unit he occupied and what he failed to pay.

THE COURT: Let her answer the question and we'll go forward.

A I turned over a unit to counselors with gas and electricity. I was never paid for that. They were to pay me for that. Iwas never paid for air-conditioners and heaters that the people had agreed --

MR. GRUBBS: I object to this. I am asking a simple question.

Q Name the party who occupied a particular cottage and didn't pay you what he agreed to pay you in accordance with the agreements there.

A Weil didn't pay me for the use of the air-conditioner for two months.

Q How much was he in default on that payment? What did that payment amount to?

MR. ORSECK: I object. Even if she didn't collect it, we can't make a claim. That's her credit problem. It does not innure to anybody --

THE COURT: The ultimate goal here is to establish what the income was in the summer of '76. That's all we are after. So the question is how much of this income -- how much that was expected was not received?

MR. COLIN: The witness said this was not reflected in the lease documents. It is outside of the documents.

MR. ORSECK: We agree it is irrelevant.

THE COURT: All right.

Q Would it be fair to say that in view of what you told us, and after examining these agreements, that Doralee Estates was fully rented during the year 1976?

A No.

Q To what extent? How many units did you have that were not rented?

A One for a half a season.

Q One unit for one half season?

A Yes.

MR. GRUBBS: Thank you.

THE COURT: How long are you going to be on redirect?

MR. ORSECK: Very short, your Honor.

THE COURT: You may proceed.

REDIRECT EXAMINATION

BY MR. ORSECK:

Q I address you now, Mrs. Huss, only with respect to bungalow rental units. Do you understand that?

A Yes.

Q Do you understand that I address you not with respect to apartments in the winter houses, not with respect to the mobile home; do you understand that?

A Yes.

Q Would you tell the jury how many such bungalow units there are?

A May I count them?

Q They are numbered one to 23; is that not so?

A That's right. We don't have a number 13.

Q How many are there?

A Twenty-two.

Q For all the leases we have furnished counsel none of them have a number 13; is that correct?

A Yes.

Q The reason for that is that there is none?

A That's right.

Q I show you Plaintiff's Exhibit 66 for identification. I ask you whether or not some of the data on that exhibit represents the summer rentals that you charged and collected for occupancy for 1973, 1974, 1975, and 1976 for these 22 units alone.

MR. GRUBBS: I will object to the form, your Honor.

(Record record.)

MR. COLIN: I join in the objection.

THE COURT: Sustained.

Q Have you compiled in tabular or list form, unit by unit, for the years 1973, 1974, 1975, and 1976, the summer rentals charged and collected by you for these bungalow units?

A Yes.

Q Does that data appear on Exhibit 66 for identification?

A Yes.

MR. GRUBBS: Objection. There is no proper foundation.

THE COURT: It has not been offered yet.

Let's take our break at this point since I have to recess at twelve-thirty. We will take our mid-morning

break for ten minutes.

(Recess.)

(Jury in box.)

THE COURT: Can we admit Plaintiff's Exhibit 66 for identification at this time to the extent that it is a reflection of a tabulation of the Doralee rentals for the years involved?

MR. COLIN: Provided that the comparative is removed and the caption is changed or covered and subject to verification on our --

THE COURT: Two or three items?

MR. COLIN: I would not object, your Honor.

THE COURT: It will be received on that basis.

xxx (Plaintiff's Exhibit 66 received in evidence.)

THE COURT: Do you have any further inquiry?

MR. ORSECK: I have a few more questions.

BY MR. ORSECK:

Q In October of 1972, before you even ever met me, was the lake emptied?

MR. COLIN: I object to the form of the question.

MR. GRUBBS: I object. This is improper redirect examination.

THE COURT: I will permit it.

A Yes.

Q At that time you saw the bottom of the lake, did you not?

MR. COLIN: Objection.

MR. GRUBBS: This is going into matter that was not gone into on cross-examination.

THE COURT: We have certain matters here having to do with other lawsuits and so on.

MR. GRUBBS: I object to the form.

A Yes.

Q Did you get in touch with the defendants at that time?

A Yes.

Q Who and when --

MR. GRUBBS: I object, your Honor.

THE COURT: Come here to the bench and tell me where you are going.

(At the side bar.)

THE COURT: What is all this proof about?

MR. ORSECK: The defendants attempted to show --

MR. COLIN: Who are the defendants?

MR. ORSECK: I don't care who they are.

MR. COLIN: I do.

MR. ORSECK: They attempted to show she was

1 litigation-prone and an exaggerater. That's clear from
2 the cross-examination. I want to show -- and we can show
3 it documentarily -- that she --
4 THE COURT: You want to elicit a conversation
5 she had with the representative of the defendant?
6 MR. ORSECK: She asked him: Here is the lake;
7 clean it out for me and I don't want to sue.
8 She confirmed that by writing a letter to the
9 Supreme Court, to Judge Pitt , and recited what she did and
10 said, "I don't want to sue."
11 MR. COLIN: Keep your voice down. It is
12 within earshot of the jury.
13 THE COURT: I don't think so. Mr. Orseck is
14 practically sitting on the floor of the witness box. His
15 head is below the rail. Let the record show that.
16 Did she have a conversation with a representa-
17 tive of the defendant?
18 MR. ORSECK: She had a meeting. There is
19 agency. There is proof that there was a commission --
20 MR. GRUBBS: I will object to any conversation
21 at this time.
22 THE COURT: She asked him to come and look at
23 the lake?
24 MR. ORSECK: They refused to do it.
25

THE COURT: I will permit you to go that far and no further.

MR. COLIN: We want an identification of the person.

THE COURT: You will have that.

MR. GRUBBS: May I have a --

THE COURT: You may bring out that she testified that a Mr. Pantel of MGO was asked to look at the lake at the time it was drained and nobody from MGO came to look at the lake.

MR. COLIN: I will object to that as not being binding on Cities Service. I think it should not go into the record.

MR. GRUBBS: I object.

THE COURT: I will permit it.

(In open court.)

BY MR. ORSECK:

Q In October of 1972 did you communicate with a representative of Monticello Gas & Oil?

A Yes.

Q Which one or ones?

A Dr. Pantel.

Q Who is he?

A He is a practicing dentist and one of the owners

of MGO.

Q What did you say to him and what did he say to you?

MR. COLIN: Objection.

MR. GRUBBS: I ask the answer be stricken. No proper foundation.

MR. COLIN: I object on the ground that any conversation had by Mrs. Huss with a member of the MGO, Monticello Gas & Oil organization, is not binding on Cities Service, and it will be highly prejudicial to receive this testimony insofar as the inte rest of Cities Service is concerned.

MR. ORSECK: This record is chuckful of written admissions.

THE COURT: Counsel, for a lot of reasons I will sustain that objection.

MR. ORSECK: I have no further questions.

THE COURT: Thank you very much. You are excused.

(Witness excused.)

THE COURT: Is that the plaintiff's case?

MR. ORSECK: Yes, except for some legal matters and for the admission of one further document in evidence which was discussed prior to the case.

THE COURT: Ladies and gentlemen, except for one or two little matters which I will take up at a later time the plaintiff has rested its case.

Cities Service, you may go forward with your case.

MR. COLIN: Very well, your Honor.

I offer in evidence this letter dated June 23, 1972.

MR. ORSECK: That's consented to.

THE COURT: Is there any objection?

MR. GRUBBS: I would like to see it, if I may.

(Pause.)

(Defendants' Exhibit CC marked for identification.)

xxx

MR. GRUBBS: No objection, your Honor.

THE COURT: It will be received.

xxx

(Defendants' Exhibit CC received in evidence.)

MR. COLIN: With your Honor's permission I will read this letter to the jury.

THE COURT: You may.

(Mr. Colin read to the jury from Defendants' Exhibit CC in evidence.)

MR. ORSECK: Since the plaintiff has rested and has no opportunity to present further proof, I would ask that

the exhibit be exhibited to the jury.

THE COURT: That may be done at some later time.

MR. ORSECK: Thank you, your Honor.

MR. COLIN: Let the record show in connection with Exhibit CC that annexed to the letter I just read, a four-page document incorporating a separator system.

S U S A N D I A N E W I S S N E R, called by the defendant Cities Service Oil Co., having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

xxx BY MR. COLIN:

Q What is your address, Miss Wissner?

A 7 Thornwood Place, Scarsdale, New York.

Q What is your job, Miss Wissner?

A I am a paralegal at Baer & Marks.

Q That's my law firm?

A Right.

Q What does that job title represent in terms of work?

MR. ORSECK: Your Honor, I have an objection. I would like to make it at the side bar.

THE COURT: Let's go a little bit here before you make an objection.

Q Are you a legal assistant in the law firm?

A Yes.

Q Have you any schooling beyond high school?

MR. ORSECK: Objection.

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: What are we getting into?

MR. COLIN: She tabulated the rents. I wanted to show that she is an educated school-qualified person.

THE COURT: Counsel, you have stipulated to this?

MR. ORSECK: Nobody asked me.

What do you want to show?

THE COURT: She ran a tape of something?

MR. COLIN: She made a tabulation of 1965 through 1976 of the rents on the basis of the leases furnished to us.

MR. ORSECK: Number one, if I can see the tapes--

I tried to do it before 1972. After 1972 if she shows me the tapes I am sure there is substantial agreement with the exhibit just received and I will agree to it.

MR. COLIN: She has done it since 1965.

THE COURT: They argued they could go back to 1965 to show the overall effect of the oil spill over the years.

MR. ORSECK: We have not checked them back that far.

Why don't we go forward?

MR. COLIN: I would like to be helpful. I have no objection to giving Mr. Orseck these schedules. I will take her off the stand if I can have about five minutes to talk to another witness whom I can put on in her place. Maybe that will save time in the overall.

THE COURT: I have to recess in about five minutes because I have a meeting with my two Court of Appeals colleagues from yesterday's sitting, and I will not be back on the bench until about two-thirty. That ought to give everybody time to do a lot.

Do you want a recess now?

MR. COLIN: Good.

THE COURT: You don't need any more questions then.

(In open court.)

MR. ORSECK: I will agree with him, your Honor.

THE COURT: You are excused.

(Witness excused.)

THE COURT: Ladies and gentlemen, counsel have graciously agreed to do certain things during a long lunch hour that I am imposing on them by the duties I have here.

It has nothing to do with this case. As a consequence we will be in recess until two-thirty.

(Luncheon recess.)

- - -

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Murray H. Berman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 311 W. 97th Street N.Y., N.Y. 10025

That on the 16 day of June, 1977, deponent personally served the within Joint Appendix Volume II of III upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose

By leaving 1 true copy of same with a duly authorized person at their designated office.

~~By depositing~~ _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

Joseph D. Ahearn, Of Counsel
Grubbs, Leahy & Donovan
Attorneys for Third-Party Defendants-Appellees,
MGO Corp. and Monticello Gas and Oil Co., Inc.
233 Broadway
New York, New York

Murray H Berman

Sworn to before me this
16 day of June, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0030908
Qualified in Queens County

Received 3 copies of the within
Joint Appendix Volume II of III
this 22 day of June, 197?

Sign [illegible]

For: Gerald Crisick Esq(s).

Att'ys for plaintiff

Counsel Press, 55 West 42nd Street